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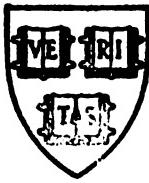
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11

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland.

WILLIAM T. BRANTLY,

STATE REPORTER.

VOLUME 81.

CONTAINING CASES IN JANUARY AND APRIL TERMS, 1895.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

THE COURT OF APPEALS.

Hon. JOHN MITCHELL ROBINSON, Chief Judge.
Hon. HENRY PAGE, Associate Judge.
Hon. DAVID FOWLER, Associate Judge.
Hon. ANDREW HUNTER BOYD, Associate Judge.
Hon. CHARLES BOYLE ROBERTS, Associate Judge.
Hon. JAMES McSHERRY, Associate Judge.
Hon. JOHN PARRAN BRISCOE, Associate Judge.
Hon. WILLIAM SHEPARD BRYAN, Associate Judge.

THE CIRCUIT COURTS.

FIRST JUDICIAL CIRCUIT.—*Worcester, Somerset, Dorchester
and Wicomico Counties.*

Hon. HENRY PAGE, Chief Judge.
Hon. HENRY LLOYD, Associate Judge.
Hon. CHARLES F. HOLLAND, Associate Judge.

SECOND JUDICIAL CIRCUIT.—*Caroline, Talbot, Queen Anne's,
Kent and Cecil Counties.*

Hon. JOHN MITCHELL ROBINSON, Chief Judge.
Hon. JOSEPH A. WICKES, Associate Judge.
Hon. FREDERICK STUMP, Associate Judge.

THIRD JUDICIAL CIRCUIT.—*Baltimore and Harford Counties.*

Hon. DAVID FOWLER, Chief Judge.

Hon. JAMES D. WATTERS, Associate Judge.

Hon. NICHOLAS CHARLES BURKE, Associate Judge.

FOURTH JUDICIAL CIRCUIT.—*Allegany, Garrett and Washington Counties.*

Hon. ANDREW HUNTER BOYD, Chief Judge.

Hon. HENRY W. HOFFMAN, Associate Judge.

Hon. EDWARD STAKE, Associate Judge.

FIFTH JUDICIAL CIRCUIT.—*Carroll, Howard and Anne Arundel Counties.*

HON. CHARLES BOYLE ROBERTS, Chief Judge.

Hon. I. THOMAS JONES, Associate Judge.

Hon. JAMES REVELL, Associate Judge.

SIXTH JUDICIAL CIRCUIT.—*Montgomery and Frederick Counties.*

Hon. JAMES McSHERRY, Chief Judge.

Hon. JOHN A. LYNCH, Associate Judge.

*Hon. JAMES B. HENDERSON, Associate Judge.

SEVENTH JUDICIAL CIRCUIT.—*Prince George's, Charles, Calvert and St. Mary's Counties.*

Hon. JOHN PARRAN BRISCOE, Chief Judge.

Hon. JOHN B. BROOKE, Associate Judge.

Hon. J. PARRAN CRANE, Associate Judge.

*Appointed by the Governor on January 21st, 1895, *vice* the Hon. John T. Vinson, whose term of office had expired by constitutional limitation, and elected by the people November 5th, 1895.

NAMES OF THE JUDGES, &c.

v

EIGHTH JUDICIAL CIRCUIT.—*Baltimore City.*

Hon. HENRY DAVID HARLAN, Chief Judge.

Hon. CHARLES EDWARD PHELPS, Associate Judge.

Hon. JOHN UPSHUR DENNIS, Associate Judge.

Hon. DANIEL GIRAUD WRIGHT, Associate Judge.

Hon. PERE L. WICKES, Associate Judge.

Hon. ALBERT RITCHIE, Associate Judge.

Hon. JOHN J. DOBLER, Associate Judge.

Attorney-General.

JOHN PRENTISS POE, Esq.

Clerk of the Court of Appeals.

J. FRANK FORD, Esq.

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Decided During the Period Comprised in this Volume and Designated by the Court "Not to be Reported."

BALTO. AND OHIO R. R. CO. vs. JOSEPH PERLMAN et al. *Tobacco belonging to the plaintiffs and stored in defendant's warehouse was injured by a flooding of the warehouse, which was caused by a high tide and severe storm. Subsequently, plaintiffs, in order to escape the payment of duties upon the damaged tobacco, made application in accordance with the regulations of the Treasury Department of the United States, etc., for relief, and stated that the tobacco had been damaged by a casualty, and upon such application the plaintiffs were in fact relieved from the payment of the duty upon such portion of the tobacco as was ascertained to have been injured in the manner described. Held, that the plaintiffs cannot now recover damages from the defendants, upon the ground that the injury was not the result of a casualty, unmixed with negligence on the part of the defendant.* No. 46, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 751, of "Opinions Unreported."

GEORGE BEHM vs. JEFFERSON PARKER. *Goods which have been purchased on the instalment plan from the defendant and not fully paid for were transferred to the plaintiff with notice of the contract. These were taken from plaintiff's house by persons professing to act as agents of defendant, and these persons also took away other property of the plaintiff and injured his carpet and a chair. In an action to recover damages for the trespass, it was held, upon the facts of the case, that such persons were the agents of the defendant; that, under the contract of sale, the defendant was authorized to take away in an orderly manner the articles bought from him on the instalment plan and not paid for; that as to the other articles taken away, which defendant's agents erroneously supposed to belong to defendant and which were returned to plaintiff on demand, the plaintiff was entitled to recover the rental value thereof while so detained, and the value of the carpet and chair so damaged, but that there was no evidence to entitle the plaintiff to*

recover primitive damages. No. 19, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 747, of "Opinions Unreported."

R. B. B. CHEW vs. JAMES T. PERKINS, Trustee. *A trustee appointed to collect taxes uncollected by a deceased collector, engaged the professional services of the plaintiff, a lawyer. Plaintiff filed a petition praying for an injunction to restrain the trustee from making further payments of the amounts collected to the County Commissioners, and asking for a decree directing the payment of his compensation for professional services out of said fund. Held, that the question is simply one of contract between counsel and client, and that plaintiff had a complete and adequate remedy at law.* No. —, January Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J. No. 1, J. F. F., No. 1, folio 739, of "Opinions Unreported."

CARRIE G. FUTTERER vs. WM. KEALHOFER, Administrator of F. A. FUTTERER. *A married woman, intending to buy certain land, obtained a sum of money from her agent which she entrusted to her husband to keep until the purchase should be effected. He deposited it in bank in his own name. He had there at that time but a few dollars to his credit and made no subsequent deposit. He checked out about one-half of the amount for his own purposes and died. The balance in bank was claimed by his administrator as belonging to his estate. Held, that the said balance was identified as the separate property of the wife and that she was entitled to receive the same.* No. 23, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 754, of "Opinions Unreported."

FREDERICK A. HOKE vs. WM. WHEELER. *Exceptions were taken to the action of the Court below in overruling objections to the admissibility of evidence. The questions asked were set forth in the exceptions, but the answers were not given. Held, that to warrant a reversal of a judgment there must be error and injury and both must appear. The answer given by a witness may be indifferent, or it may be favorable to the party not calling him. But unless the record sets it forth, this Court cannot know what it was and cannot assume that it caused the objecting party any injury.* No. 21, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 757, of "Opinions Unreported."

CHARLES SNYDER vs. JOSEPH L. GILLOTT et al. *A Justice of the Peace has no right to require a plaintiff in an attachment against a non-resident to give a bond before issuing the writ, and if such bond be so given, no action lies on it.* No. 30, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 750, of "Opinions Unreported."

S. THEODORE STOUFFER, Trustee, vs. JESSE C. CLAGETT. *A Court of Equity has no power to compel a trustee, against his will, to invest a part of the trust estate in perishable property for the benefit of the cestui que trust life tenant.* No. 9, April Term, 1895. Recorded in Liber J. S. F., No. 2, S. C. J., No. 1, J. F. F., No. 1, folio 744, of "Opinions Unreported."

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MARYLAND REPORTS.

JANUARY AND APRIL TERMS, A. D. 1895.

H. M. REVELL AND OTHERS vs. THE MAYOR, COUNSELLOR AND ALDERMEN OF THE CITY OF ANNAPOLIS.

Constitutional Law—Power of Legislature over Municipality—Directing Issue of Bonds to pay for Public School Building.

The Legislature has the power to provide for the erection of a public school building within the limits of a city, and to direct the municipal authorities to issue bonds for the purpose of paying for such building, with or without the consent of the voters of the city.

The Legislature has the right to compel a municipal corporation to levy a tax or incur a debt for a public purpose, or one within the ordinary functions of municipal government. And the erection of a building for a public school is such a purpose.

The Act of 1894, ch. 620, provided for the erection of a public school building in the city of Annapolis, in Anne Arundel County, and to pay for the same, directed the County Commissioners of Anne Arundel County to issue bonds to the amount of \$20,000, and also directed the city of Annapolis to issue bonds to the amount of \$10,000, without submitting the question of their issue to a vote of the citizens of Annapolis. The charter of the city authorized the Mayor, &c., to issue bonds, provided the loan was approved by a majority of the voters. The city authorities refused to issue the bonds directed by the Act, without first submitting the question to a popular vote. Upon a petition for a *mandamus* to compel the issue, filed by the Building Committee, appointed under the Act, *Held*,

1st. That the Act was a valid exercise of the legislative power.

2nd. That the apportionment of the cost of the building between the county and the city was a matter within the discretion of the Legislature.

- 3rd. That although a general law provides that the public schools of a county shall be under the control of the School Commissioners, with power to build and repair school houses, yet such law does not authorize them to borrow money, or provide for the apportionment of the cost of erecting buildings; and therefore, the Act in question is not in violation of Constitution, Art. 3, sec. 33, which provides that the General Assembly shall pass no special law, in any case, for which provision has been made by an existing general law.
- 4th. That the Act is not repugnant to the Fourteenth Amendment of the Constitution of the United States, since the levy of taxes to pay for bonds lawfully issued by a municipality is not a taking of property without due process of law.

Appeal from the Circuit Court for Anne Arundel County.
Under the Act of 1894, ch. 620, a building committee was appointed to purchase a lot in the city of Annapolis and erect thereon a public school building. Section 4 of the Act provided that for the purpose of paying for the same "the School Commissioners of Anne Arundel County are hereby authorized and directed to borrow, on the endorsement of the County Commissioners of Anne Arundel County, who are hereby authorized and directed to endorse said bonds on the credit of said county, an amount not exceeding the sum of twenty thousand dollars, * * * but said bonds shall not be issued * * * until the corporation of Annapolis has appropriated the sum of ten thousand dollars towards the purchase of said lot and the erection and furnishing of said building; * * * and the said city is hereby authorized and directed to issue bonds to the amount of ten thousand dollars to raise the money to appropriate to the payment of said public school building; provided, that the issue of said bonds on the part of the city of Annapolis shall be simultaneous with the issue of said bonds by Anne Arundel County, and that such issue of bonds by the city of Annapolis shall be issued by the said Mayor, Aldermen and Counsellor of Annapolis, without submitting the question of their issue to a vote of the citizens of Annapolis, all provisions of the charter of the said city of Annapolis to the contrary, notwithstanding."

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Statement of the Case.

The majority of the Building Committee filed a petition setting forth that the Mayor, &c., refused to issue said bonds without first submitting an ordinance to the qualified voters of the city, in order to ascertain if the same would be authorized, and praying for a writ of *mandamus* commanding the issue of the bonds. The answer of the municipality relied upon the charter of the city, Code Public Laws, Art. 2, sec. 37, which provides that the Mayor, etc., of Annapolis shall have power to issue bonds, provided that a majority of the legal voters of the city shall approve of the loan at an election to be held, &c. The answer further insisted that the Act is a special Act in a case for which provision is already made by general law, and, therefore, is in violation of the provisions of Article 3, section 33, of the Constitution; also, because "the imposition of taxes upon the taxpayers of the city of Annapolis for objects outside the chartered powers of the said corporation of Annapolis, without the approval of a majority of the legal voters of said city, is unconstitutional and void, because the Legislature cannot legally require said city to subscribe money to, or issue bonds for any object outside the chartered powers of said corporation, and that the said corporation of the city of Annapolis, not having been erected for any educational purposes whatever, the said Act of 1894, chapter 620, attempting to compel it to subscribe and donate the sum of ten thousand dollars to a public school building is, therefore, unconstitutional and void." And further, because the issue of such bonds would lead to an unequal and ununiform tax in one part of a taxation district for school purposes. The petitioners demurred to the answer and from the order of the Court below (ROBERTS, C. J., and REVELL, J.), overruling the demurrer and dismissing the petition, this appeal was taken.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER and BRISCOE, JJ.

John Prentiss Poe, Attorney-General, and Robert Moss (with whom was *F. Eugene Wathen* on the brief), for the appellants.

The charter of Annapolis is in itself nothing but an Act of Assembly subject to repeal or amendment, and the provision in its charter directing a popular vote as a condition to the creation of a public debt, it is entirely within the power of the Legislature to rescind, alter or repeal altogether. Hence the Act in question must be treated as a repeal, for the purpose of this public improvement, of the existing provision in the charter requiring the approval of a majority of the qualified voters, such repeal being distinctly enacted by the same legislative authority which in the charter requires such popular vote. If it was within the power of the General Assembly to authorize the corporation of Annapolis to issue bonds for corporate purposes ; provided, the majority of its qualified voters should first approve, it is quite as clearly within their power to authorize the issue of bonds without such *antecedent* approval. The consent of the voters is not necessary to the imposition of a tax. If it were conceded that the Legislature could only validly compel a municipal corporation to tax its people, without its consent, for a public *State* purpose, the Act under review would be clearly valid, for the establishment of public schools is a part of the system of public education.

The Act in question is clearly within the power of the General Assembly over municipal corporations and over the subject. *Mayor, &c., of Frederick*, 44 Md. 67 ; *Mayor, &c., v. Groshon*, 30 Md. 436 ; *Talbot Co. v. Queen Anne's Co.*, 50 Md. 245 ; *Daly v. Morgan*, 69 Md. 460 ; *St. Mary's School v. Brown*, 45 Md. 333 ; *State v. Sterling*, 20 Md. 516 ; *State v. Mayhew*, 2 Gill, 487 ; *State v. Mayor, &c., of Baltimore*, 52 Md. 419 ; *Comrs. of Revenue v. State*, 45 Ala. 399 ; *Gordon v. Cornes*, 47 N. Y. 608 ; *County of Livingston v. Darlington*, 101 U. S. 407 ; *Grim v. Weissenberg, etc., District*, 57 Pa. St. 436 ; *Mayor of Cartersville v. Baker*, 73 Geo. 686 ; 2 *Dillon on Mun. Corp.* 831, note.

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Argument of Counsel.

Elihu S. Riley (with whom was *Wm. Pinkney Whyte* on the brief), for the appellees.

A city cannot be compelled to issue bonds against its will, to provide funds for an object outside its powers. *Cooley's Constitutional Limitations*, 6th edition, pp. 285, 287 and note; *Cooley on Taxation*, ch. XXI; *Callam v. Saginaw*, 50 Mich. 7; *Supervisors of Livingston Co. v. Weider*, 64 Ill. 427; *Sleight v. People*, 74 Ill. 47; *Mather v. Ostend*, 114 Ill. 657; *Will Co. Sup. v. People*, 110 Ill. 511; *Hasbruck v. Milwaukee*, 13 Wis. 37; *Mills v. Charleston*, 29 Wis. 400; *People v. Batchellor*, 53 N. Y. 128; *East St. Louis v. Waits*, 59 Ill. 155; *Marshall v. Sellman*, 61 Ill. 218; *Barnes v. Lacon*, 84 Ill. 461; *People v. C. C. of Chicago*, 51 Ill. 58; *Livingstown v. Miles*, 53 Ill. 302; *People v. County*, 55 Ill. 33; *Miles v. East St. Louis*, 55 Ill. 133; *People v. Mayor, &c.*, 51 Ill. 17 to 31. *Contra* —45 Ala., p. 399, *President and Comrs. v. State*. This is the only case to be found in the reports.

In *Will Co. Supr. v. People*, 110 Ill., p. 511, it was held that a State law to tax towns and counties for building bridges, roads and highways, in which all the people of the State were interested, was unconstitutional. All the people of Anne Arundel are interested in this school house; it will be the property of the whole county, its deed and fee held in the name of the Board of County School Commissioners of Anne Arundel County; how, then, in law and equity, can the citizens of Annapolis be compelled to pay this large bonus to a school house in which all the people of the county are interested.

In *Jenkins v. Andover*, 103 Mass. 94, a statute permitting a town to tax itself for the benefit of a private incorporated academy was held invalid because the school was not under the control of the town authorities, "and outside its corporate powers." In *Lowell v. Boston*, 111 Mass. 473, where an Act of the Legislature, after a great fire, authorized Boston to issue bonds to loan to the sufferers, the Court said: "The expenditure authorized by the statute being for private and not

for public objects, it exceeds the constitutional power of the Legislature." Annapolis City will have, as a corporation, not one iota of control of this public school when built. It will be absolutely in the hands of another corporation. The charter of the city of Annapolis contains no provision requiring it to erect, maintain, repair or furnish public school houses, nor to perform any duties relating to public education. That duty is assigned to another corporation, "The School Commissioners of Anne Arundel County."

Act of 1894, ch. 620, is a special act where a general law exists. No clearer case of a violation of the constitutional inhibition, made in sec. 33, Art. 3, of the Constitution of Maryland, could be presented. Art. 77, sec. 2 of the Code, provides that "It shall be the duty of the Board of County School Commissioners to select a suitable school house site in each district, whenever the necessities of the public schools demand a change of site or sites already built upon or a new house to be built;" and the Constitution, sec. 33, Art. 3, says: "The General Assembly shall pass no special law for any case for which provision has been made by an existing general law." General law has provided for the selection of school house sites. The Act of 1894, chap. 620, selects a special committee to take this duty out of the hands of the proper authorities and act contrary to statute and organic law. See *Const. Law in Amer. & Eng. Ency. of Law*, p. 697. See 6th Md., p. 471, *Commrs. of Washington Co. v. Nesbitt*, where control of clerk over the Court House, under a special law, incompatible with the general law giving County Commissioners control of Court Houses.

The Legislature cannot compel a city to create a debt against its will. In the following cases legislative mandates were declared to be void: *People v. Mayor, &c.*, 51 Ill. 17; *People v. Common Council*, 51 Ill. 58; *Marshall v. Sellman*, 61 Ill. 218; *Callam v. Saginaw*, 50 Mich. 7. In *Hasbrouck v. Milwaukee*, 13 Wis. 37, approved and defended in

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Argument of Counsel.

an able opinion, in *Mills v. Charleton*, 29 Wis. 400, the power of the Legislature to compel the city of Milwaukee to issue bonds and levy a tax for the improvement of its harbor, was distinctly denied. In *People v. Batcheller*, 53 N. Y. 128, the Court of Appeals denied the validity of a mandatory statute compelling a town to take stock in a railroad company, and to issue its bonds in exchange therefor. This opinion reviews prior decisions in the same State, and finds nothing in conflict with the views expressed.

"The principle of liability for taxes in proportion to actual worth in real and personal property, declared by the 13th Art. Dec. of Rights, is a bar to double taxation, and all legislative provisions for the assessment and collection of taxes should be so construed as to avoid that result?" *State v. Sterling*, 20 Md. 520. Can a double taxation for the same object—the public schools of Anne Arundel—be avoided in this case unless chap. 620, Acts of 1894, is declared void and unconstitutional? *State v. Cumb. & P. R. R. Co.*, 40th Md. 50 and 51; *Tyson et al. v. State*, 28 Md. 586; *Daly v. Morgan and others*, 69 Md. 460. In *Daly v. Morgan*, 69 Md. p. 460, this Court has laid down the broad and comprehensive doctrine that the taxes imposed by the State must be equal and uniform throughout the State, county, city or taxing district to which it applies."

Annapolis City is, for public school purposes, on which a separate tax is laid, in the county, in Anne Arundel County—a taxing district. It would, indeed, be revolting to justice for the County Commissioners to say that the first district of Anne Arundel County should pay ten cents school taxes, and Annapolis, the sixth district, fifteen ; and this law only indirectly does what directly would not be tolerated for a moment. If this Act is sustained, six of the seven districts of Anne Arundel County will pay twenty cents on the \$100 for school purposes, and the tax-payers of Annapolis, the other district, towards the same objects, will pay twenty-eight cents on the \$100, and this unequal rate will, with a slight decrease in the ratio of proportion,

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continue until the debt is paid. Is this "equal and uniform throughout * * * the taxing district?"

ROBINSON, C. J., delivered the opinion of the Court.

The Act of 1894, chapter 620, provides for the erection of a public school building in the city of Annapolis, and to pay for the same, it authorizes and directs the School Commissioners of Anne Arundel County to borrow money, not exceeding the sum of twenty thousand dollars, on bonds, to be endorsed by the County Commissioners. And for the same purpose it directs that the city of Annapolis shall issue bonds to the amount of ten thousand dollars, and that said bonds shall be issued without submitting the question of their issue to the voters of said city.

The city of Annapolis has refused to issue the bonds as thus directed by the Act, and the question is whether the Legislature has the power to direct that the city authorities shall issue bonds to raise money to be applied to the erection of a public school building in said city.

This power is denied on the broad ground that it is not competent for the Legislature to compel a municipal corporation to create a debt or levy a tax for a local purpose, in which the State has no concern, or to assume a debt not within the corporate powers of a municipal government. If the correctness of this general proposition be conceded for the purposes of this case, we do not see how it affects, in any manner, the validity of the Act now in question. We cannot agree that the erection of buildings necessary for the public schools is a matter of merely local concern, in which the State has no interest. In this country the people are not only in theory but in practice the source of all governmental power, and the stability of free institutions mainly rests upon an enlightened public opinion. Fully recognizing this, the Constitution declares that it shall be the duty of the Legislature "to establish throughout the State a thorough and efficient system of free public schools, and to provide by taxation or otherwise" for their maintenance

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and support, Art. 8, sec. 1. And the Legislature has accordingly established a public school system, and has provided for its support by State and local taxation. It cannot be said, therefore, that the erection of buildings for public school purposes is a matter in which the State has no concern, nor can we agree that the creation of a debt for such purposes is not within the ordinary functions of municipal government. What is a municipal corporation? It is but a subordinate part of the State government, incorporated for public purposes, and clothed with special and limited powers of legislation in regard to its own local affairs. It has no inherent legislative power, and can exercise such powers only as have been expressly, or by fair implication, delegated to it by the Legislature. The control of highways and bridges within the corporate limits, the power to provide for an efficient police force, to pass all necessary laws and ordinances for the preservation of the health, safety and welfare of its people, and the power to provide for the support of its public schools by local taxation, are all among the ordinary powers delegated to municipal corporations. And the public schools in Baltimore City are not only under the control and supervision of the city authorities, but are mainly supported by municipal taxation. It is no answer to say that the public schools in Annapolis are under the control of the School Commissioners of Anne Arundel County, and that under its charter it has no power to create a debt or levy taxes for their support. The Legislature may, at its pleasure, alter, amend and enlarge its powers. It may authorize the city authorities to establish public schools within the corporate limits, and direct that bonds shall be issued to raise money for their support, payable at intervals during a series of years. There is no difference in principle between issuing bonds and the levying of a tax in one year sufficient to meet the necessary expenditure. It would be less burdensome to taxpayers to issue bonds payable at intervals than to levy a tax to raise ten thousand dollars in any one year. This, however, is a matter of detail within the dis-

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cretion of the Legislature, and over which the Courts have no control.

If the Legislature has the power to direct the city authorities to create a debt for a public school building, the exercise of this power in no manner depends upon their consent or upon the consent of the qualified voters of the city. We recognize the force of the argument that the question whether a municipal debt is to be created ought to be left to the discretion and judgment of the people who are to bear the burden. We recognize, too, the fact that the exercise of this power by the Legislature may be liable to abuse. But the abuse of a power is no argument against its exercise. The remedy, however, in such cases, is with the people, to whom the members of the Legislature are responsible for the discharge of the trust committed to them. It is a matter over which the Courts have no control. If the debt to be created was for a *private purpose* that would present quite a different question, for it is a fundamental principle, inherent in the nature of taxation itself, that all burdens and taxes shall be levied for public and not for private purposes. Be that as it may, it is well-settled in this State that the Legislature has the power to compel a municipal corporation to levy a tax or incur a debt for a public purpose, and one within the ordinary functions of a municipal government.

In *Pumphrey's case*, 47 Md. 145, a *mandamus* was sued out to compel the Mayor and City Council of Baltimore to purchase a bridge over Gwynn's Falls, within the corporate limits, as directed by the Act of 1876; and the Court held that it was the duty of the city to build and keep in repair bridges over its highways, and that the Legislature had the power to compel it to buy a bridge already constructed.

And in *Mayor & C. C. of Balto. v. Reitz*, 50 Md. 574, it was decided that the Legislature had the power to compel the city authorities to acquire by condemnation a lot of ground in said city to be used as a public square or park. Again in *County Comrs. of Talbot County v. County Comrs.*

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of *Queen Anne's Co.* 50 Md. 245, it was held that the Legislature had the power to compel the Commissioners of Talbot County to levy a tax to pay one-half of the expense of building a bridge over "Kent Island narrows," and on the ground that the bridge was a public improvement of special interest and advantage to that county.

And we may here add that the case of the *Commissioners of Revenue*, 45 Alabama, 399, which was so much criticized in the argument and which is also criticized by Judge Cooley, in his Constitutional Limitations, has, since the publication of the latter work, been confirmed without dissent by the Supreme Court. *County of Mobile v. Kimball*, 102 U. S. Rep. 691. In that case the Legislature of Alabama appointed a Board of Harbor Commissioners for the purpose of deepening and improving the bay of Mobile, and directed that the Commissioners of Revenue for the county of Mobile should issue coupon bonds of the county and deliver the same to the Harbor Commissioners to be sold and the proceeds applied in payment of the expenditure. On application for a *mandamus* to compel the Commissioners of Revenue to issue the bonds, the Supreme Court held that the Act was a valid exercise of legislative power. Referring to the Act, Mr. Justice Field says: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited."

To prevent any misapprehension, it may be as well to say that we do not mean to decide that it is competent for the Legislature to compel a municipal corporation to create a

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debt or levy a tax for a public improvement in another portion of the State, without reference to any special benefit to be derived therefrom by the city. Nor do we mean to decide that it is competent for the Legislature to compel a municipal corporation to bear the expense of a public improvement to be used exclusively for State purposes. What we do decide is that the Legislature has the power to provide for the erection of a public school building in the city of Annapolis, and to direct that the city authorities shall issue bonds for the purpose of raising money to pay the cost of such building, and this too, with or without the consent of the voters of said city. It is quite unnecessary to consider the many cases referred to in the full and able argument of the counsel for the appellees, and in which the Courts of the several States have dealt with the question as to the power of the Legislature to compel a municipality to create debts or incur obligations for local purposes. All the cases agree that a municipal corporation cannot be compelled to incur a debt for a *private purpose*, and in some cases it has been decided that it cannot be compelled to create a debt for a local purpose, in which the State has no concern. As to the latter question, there is some conflict of opinion. We have been unable, however, to find a case which denies to the Legislature the power to compel a municipal corporation to incur a debt for the purpose of erecting a public school building within the city limits for the use of the public schools. Such an object being a *public object*, and one *strictly within the functions of municipal government*, there is no ground on which the exercise of such a power can be denied.

Objection was also made to the Act of 1894, because the Legislature had apportioned the cost of the building between the city of Annapolis and Anne Arundel County, of which the city is a part. There is nothing in the record to show that the apportionment is in any manner unequal or unjust to the city. If any objection is to be made to the Act on this ground, it would seem that the taxpayers of

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Anne Arundel County are the persons to make the objection, for the reason that they are required to pay *two-thirds of the cost of the building*, whilst the city of Annapolis, which is *specially and directly interested in the improvement*, is required to pay but *one-third of the expenditure*. The apportionment, however, was, as we have said, a matter within the discretion and power of the Legislature. This was decided in the *County Commissioners of Talbot County*, 50 Md. 245, and also by the Supreme Court in *Mobile County v. Kimball*, 102 U. S. Rep. 691.

In closing his argument, the counsel for the appellees suggested that the Act was invalid, because it was in conflict with the Fourteenth Amendment of the Federal Constitution, which forbids the taking of "property without *due process of law*." If invalid on this ground, it is invalid under the Constitution of this State, which provides the same safeguards for the protection of life, liberty and property, and which has been the fundamental law of this State from the beginning of the Government. It is a sufficient answer to this objection to say that the Act in question, which requires the city authorities to issue bonds to raise money to pay the cost of a public school building is a lawful exercise of legislative power, and this being so, taxes levied to pay such bonds are not open to the objection of taking property "without due process of law."

Nor can we agree that the Act is in conflict with sect. 33, Art. 3, of the Constitution, which declares that "the General Assembly shall pass no special law for any case for which provision has been made by an existing General Law." The General Law provides, it is true, that the School Commissioners of Anne Arundel County shall have the control and supervision of the public schools in said county, with power to build, repair and furnish school houses. But it does not authorize the Commissioners to borrow money upon bonds to be endorsed by the County Commissioners for such purposes, nor does it provide for the apportionment of the cost of a public school building to be erected

in the city of Annapolis, between the county and the city. This could only be done by special Act, and this being so, the special Act is not in conflict with the Constitution, which forbids the passing of a special Act for any purpose for which provision has been made by an existing General Law. It follows from what we have said that the judgment overruling the demurrer in this case must be reversed.

Judgment Reversed.

(Decided March 26th, 1895.)

JOHN H. RILEY AND OTHERS *vs.* THE FIRST NATIONAL BANK OF GRAFTON AND OTHERS.

Equity Practice—Dismissing Parties to the Suit—Estoppel by Decree—Insolvency—Assignment for Benefit of Creditors—Attaching Creditors.

After certain persons have been made parties, plaintiff and defendant, in an equity suit, by order of the Court, upon a petition of the plaintiff alleging that they were necessary parties, and subsequent proceedings have been had in the cause, the solicitor of the plaintiff has no authority to file an order with the Clerk directing the dismissal of the bill as to said plaintiffs or defendants, without having previously obtained the sanction of the Court.

And when the bill has been so dismissed, without an order of Court, as to said parties, who were fully advised as to the character of the controversy, they are nevertheless bound by the decree finally passed in the cause.

After A. had executed an assignment for the benefit of creditors, the appellants, creditors of A., sued out attachments on original process. Subsequently a bill in equity was filed to declare the assignment void for fraud, and for the appointment of a receiver. Upon an order of the Court the appellants were made parties to the cause. A. was afterwards adjudicated an insolvent, and his trustee in insolvency was also made a party, and claimed the entire assets. After the demurrs to the bill were overruled and some of the defendants had answered, the appellants and other creditors who had sued out attachments against A. were dismissed from the suit by order of the

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solicitor of the plaintiff, who continued the suit in the name of other creditors. The Equity Court finally decreed that the assignment was not fraudulent in fact or in law, but that the title of the trustees under it yielded to the superior title of the trustee in insolvency, to whom the assets of A. were transferred. In the Insolvent Court an account was stated distributing the assets among all the creditors of A. *pro rata*. Appellants excepted on the ground that the assignment was void and their attachments entitled them to priority, the trustee in insolvency taking the assets subject to the inchoate lien of the attachments. *Held,*

1st. That since the appellants were dismissed from the equity suit without authority, they are bound by the final decree therein.

2nd. That the present claim of the appellants could have been set up in the equity suit, and therefore they are now estopped from making the same in the Insolvent Court; and the Equity Court having determined that the assignment was not fraudulent, the appellants are not now entitled to claim that, by reason of the assignment being void, their attachments gave them priority in the distribution of the assets.

Appeal from an order of the Circuit Court for Baltimore County, in insolvency, passed on January 9, 1895, overruling exceptions to an Auditor's Account, which distributes the assets of the insolvent firm of J. J. Nicholson & Sons among its creditors *pro rata*, and rejects the appellants' claim of a priority.

The late firm of J. J. Nicholson & Sons consisted of Johns H. R. Nicholson and Andrew J. Nicholson, and was dissolved by the death of Andrew, on January 5, 1892. On that day and for sometime prior thereto the said firm, and each member thereof, was insolvent. On January 14, 1892, J. H. R. Nicholson, individually, and as surviving partner of the firm of J. J. Nicholson & Sons, executed an assignment for the benefit of creditors to Messrs. Carter and Aiken, trustees. On January 20, 1892, the appellants, who are creditors of the said firm, sued out attachments on original process in the Courts of Baltimore City, against J. H. R. Nicholson, and caused the same to be laid in the hands of the trustees under the assignment, and also in the hands of the trustees of other parties who were indebted to the said firm. On January 22, 1892, certain creditors of the firm of J. J.

Nicholson & Sons, who had issued attachments, as well as certain creditors who had not done so, filed a bill in the Circuit Court of Baltimore City, alleging that the deed of trust was void, because made to delay, hinder and defraud the creditors of the firm of J. J. Nicholson & Sons and the individual creditors of said J. H. R. and Andrew Nicholson, and asking for the appointment of a receiver. The defendants to the bill were J. H. R. Nicholson in his own right and as surviving partner, the trustees under the deed of trust, and the personal representatives and next of kin of the deceased partner. On January 25, 1892, the creditors of the said firm who had sued out attachments, except those who were parties plaintiff, were made parties defendant by an order of Court passed upon the petition of the original plaintiffs.

On February 24, 1892, J. H. R. Nicholson was adjudicated by the Circuit Court for Baltimore County to be an insolvent debtor under a petition filed against him on February 9th, upon the ground that he, being a banker, suspended payment of his negotiable paper and never resumed payment of the same. Samuel D. Schmucker was first made preliminary, and subsequently permanent trustee of the said insolvent's estate, as well that which he held in his own right as that which he held as surviving partner of the firm of J. J. Nicholson & Sons, and the assets distributed by the Auditor's Account in this case are substantially the same which passed to the surviving partner at the time of dissolution.

On March 31, 1892, the plaintiffs in the case in the Circuit Court of Baltimore City, amended their bill by alleging the adjudication in insolvency of J. H. R. Nicholson, and thereupon Samuel D. Schmucker, the permanent trustee was made a party defendant. On April 12, 1892, the plaintiffs again amended their bill alleging that the deed of trust was an act of insolvency and void under Article 47 of the Code. The permanent trustee in insolvency filed an answer asserting title to the assets, for the reason that the deed of trust was void under the insolvent law, and also for the

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reason that, even if not void, the deed was not to be treated as an absolute conveyance, but as a lien which would follow the assets to his hands. The Circuit Court of Baltimore City, on July 11, 1892, sustained the demurrer which had been interposed by the trustees under the deed of trust and dismissed the bill of complaint. From this order an appeal was taken, and the Court of Appeals, on January 13, 1893, remanded the cause for further proceedings in conformity with their opinion reported in *Riley v. Carter*, 76 Md. 581.

On March 2, 1893, the Circuit Court of Baltimore City overruled the demurrs to the bill, and on the following day the trustees under the deed of trust and the personal representatives of the deceased partner filed their answers. On March 9, 1893, all the creditors who had sued out attachments, plaintiffs as well as defendants, were dismissed from the suit by the order of the plaintiffs' solicitors; but the same counsel continued thereafter to conduct the suit in the name of certain co-plaintiffs who were general creditors of the firm of J. J. Nicholson & Sons. Afterwards the general replication was filed and testimony taken. The Circuit Court made a decree on September 28, 1893, by which it was adjudged that the deed of trust was not fraudulent in fact or in law, and that it operated to convey the property to the trustees, Carter and Aiken, but that their title yielded to the superior title of the permanent trustee in insolvency, and further directed the trustees under the deed of trust to deliver the assets to the permanent trustee in insolvency, which was accordingly done. The trustee in insolvency intervened as claimant in all of the attachment suits and procured judgments in his favor as such claimant, whereby the litigation under the attachments was transferred to the Insolvent Court, and to the proceedings from which this appeal was taken.

By an Auditor's Account filed on September 1, 1894, the net assets of the estate, amounting to \$95,941,36, were distributed *pro rata* among all the creditors who had proved their claims. The appellants excepted to this account,

claiming that by their attachments they had acquired an inchoate lien upon the funds, which consequently passed to the hands of the permanent trustee impressed with the same lien, and that the deed of trust to Carter and Aiken was fraudulent in fact and interposed no bar to condemnation under the attachments. From an order of the lower Court (FOWLER, C. J., and BURKE, J.), overruling the exceptions, the present appeal was taken.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, PAGE, ROBERTS and BOYD, JJ.

Richard S. Culbreth (with whom was *William J. O'Brien, Jr.*, on the brief), for the appellants.

The surviving partner is not a trustee for creditors and is not required to distribute assets of the firm among its creditors without priority or preference. General creditors have no lien upon such assets. *Parsons on Partnerships*, 4th ed., sec. 345, p. 437, N. 1; *Batts' Law of Partnerships*, 2 vol., secs. 734, 929; *Lindley on Partnerships*, 2 vol., p. 1298, N. and 1300 N; *Emerson v. Senter*, 118 U. S., 7-9; *Berry, garn. v. Harris, admin.*, 22 Md. 40.

Liens can be acquired by attaching creditors within four months prior to the commencement of insolvency proceedings. *Thomas v. Brown*, 67 Md. 512.

This is not a case where the plea of *res adjudicata* will lie:

(1.) Because the appellants were not actual parties to the case of *Riley et al. v. Carter et al.*, in the Circuit Court of Baltimore City, when the decree was passed therein, they having been dismissed or having withdrawn therefrom before the general replication was filed.

(a.) As to the attaching creditors, who were made parties defendant by order of Court dated January 25, 1892, none of them ever filed answers in the case. This being a proceeding upon a creditor's bill, they were not parties until they had filed their claims in the case. There was no notice to creditors bringing in all. *Hall v. Ridgely*, 33 Md. 310.

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They were dismissed from the cases before answers were required of them. Had they filed answers they might well have objected to the jurisdiction of the Court. They could not be brought into an equity proceeding, and thus deprived of their right to a trial by jury in their attachment cases. It was their undoubted right to have their attachment cases tried by a jury. *Farrell v. Farnen*, 67 Md. 83.

The attachment cases having been instituted in the law Courts prior to the institution of the proceeding in equity, those Courts will retain jurisdiction, notwithstanding equity may have a concurrent jurisdiction. *Brooks v. Delaplaine*, 1 Md. Ch. 351; *Jenkins v. Simms*, 45 Md. 357. To be *res adjudicata* the decree must have been between the same parties, relating to the same subject-matter. *Royston v. Horner*, 75 Md. 564. In this case it is not. The causes are not the same as those determined in the Circuit Court; they are not *ad idem*. The cases were not instituted for the same purpose, and cannot possibly accomplish the same result. One condemns a fund for the benefit of the appellant; the other vacates a deed for the benefit of all creditors. The parties are not the same, no attaching creditors being parties to case in Circuit Court when testimony was taken and decree passed. The decree binds the parties to the suit, and those represented by them, and no other parties. *State v. Brown, trustee*, 64 Md. 205. It is very clear that attaching creditors cannot be brought into equity against their will, and be thus deprived of the benefit of their proceedings at law. This was expressly decided in case of *National Park Bank v. Lanahan*, 60 Md. 512; *Inloe's case*, 7 Md. 388.

(b.) As to the appellants attaching creditors who became parties plaintiff in the case of *Riley et al. v. Carter et al.*, they withdrew from the case by order of plaintiff's counsel filed before the general replication was filed and consequently before any of the testimony was taken. A creditor is not compelled to elect as to whether he will attach at law or file a bill in equity. He can pursue the concurrent remedies. *Foley v. Bitter*, 34 Md. 646.

His going into equity in no way precludes his right of continuing his suit at law unless a decree in equity, passed in the proceeding to which he is a party, determines the same issue he seeks to have determined at law. But this cannot be if he is not a party to the equity cause when testimony is taken and decree passed. He has the right to control his own case and to withdraw from it, or to dismiss it at any time before decree is passed. If he remains a party to the equity cause, thereby practically abandoning his case at law, and the Court vacates the deed and decrees a distribution, he loses any inchoate lien he might have acquired under his attachment. *Rhodes v. Amsink*, 38 Md. 345. It is idle to say that a plaintiff is not compelled to elect, and can pursue concurrent remedies, if he cannot abandon either at his option before final judgment. In this case the appellants withdrew or were dismissed, after "demurrer had been overruled," a decision which, so far as it went, was in their favor. A plaintiff may withdraw from case after opinion has been filed sustaining demurrer to his cause of action, and before formal order passed sustaining demurrer, and can renew action. *Staylor v. Jenkins*, 70 Md. 472.

• (2.) Because the appellants were not parties to the case in the Circuit Court by representation. (3.) Because the decree of that Court is not a decree *in rem*.

Certain creditors of J. J. Nicholson & Sons claimed that the assignment for the benefit of creditors made by Johns H. R. Nicholson, surviving partner, to Messrs. Carter and Aiken, was void for fraud, in fact ; this the defendants, Carter and Aiken, denied, maintaining the *bona fides* of the deed. Samuel D. Schmucker, insolvent trustee, filed an answer in the case, which was practically a claim of property, in which he claimed that the entire assets of Nicholson should be decreed to be passed over to him, as insolvent trustee, the said deed being in contravention of the terms of the insolvent law, and thus being void at the instance of the insolvent trustee. The Circuit Court by its decree decided that

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the said deed was not fraudulent in fact or in law, and sustained the claim of the insolvent trustee by decreeing that the title to the assets of Nicholson should be vested in him, and that the said deed was void as against the insolvent law. The assets passed into the hands of the insolvent trustee, subject to the inchoate liens which the appellants had acquired by their attachments. No issue had been determined as to them. And it is respectfully submitted that they have the right in the Insolvent Court to perfect the inchoate lien thus acquired. *Buschman v. Hanna*, 72 Md. 1. And to have a jury pass upon the issue of fact as to the fraudulent character *vel non* of the said deed.

Charles Marshall and Samuel D. Schmucker (with whom were *Frank Woods, George Whitelock* and *R. R. Boarman* on the brief), for the appellees.

1. Partnership creditors, although they have no direct lien upon firm assets, have a quasi or derivative lien which equity will recognize and enforce to require such assets to be applied to the *pro rata* payment of their debts. 2 *Bates on Partnership*, sections 820, 737, 1117; 1 *Lindley on Partnership*, 352; *Johnson v. Matthews*, 32 Md. 363; *Hurst v. Hill*, 8 Md. 399; *Glenn v. Gill*, 2 Md. 16; *Thompson v. Trist*, 15 Md. 26; *Gable v. Williams*, 59 Md. 318.

2. Appellants are concluded by the decree of the Circuit Court of Baltimore City from now contending that the deed of trust was fraudulent in fact. This decree determined that the deed was *not fraudulent*, and that it conveyed title to the grantees therein; and that their title passed from them to the insolvent trustee. Inasmuch as the attachments of the appellants were not issued until some days after the execution of the deed of trust, it follows, of course, that they can claim no lien by virtue of their attachments, unless they can succeed in having the deed of trust declared fraudulent and void *ab initio*. Their 5th and 6th exceptions admit this proposition. The appellants are estopped by the decree in *Riley v. Carter*, because

(a.) They were parties to that case and could have prosecuted or defended the issue there made of the *bona fides* of said deed of trust, and could have appealed from the decision of the lower Court. The estoppel on this ground is especially strong, because the leading exceptant, Riley, was himself one of the plaintiffs in the case of *Riley v. Carter*, and the counsel for appellants in the present appeal conducted the litigation on behalf of the plaintiffs in *Riley v. Carter*, and themselves led and managed the attack there made upon the *bona fides* of said deed of trust. Being in the position which the record shows them to have occupied in that case, the appellants could not, by the mere order of their counsel, without the permission of the Circuit Court of Baltimore City, so discharge themselves from the case, so as to escape being bound by the decree therein, and be at liberty to reopen and litigate afresh the questions which were there decided by the Court. 1 *Beach Modern Eq. Pr.*, section 460; 1 *Daniel Chy. Pr.*, sections 790, 793; *American Zylonite Co. v. Celluloid Co.*, 32 Fed. R. 809; *Electric Accumulator Co. v. Brush Co.*, 44 Fed. R. 602; *Conner v. Drake*, 1 Ohio State, 166; *Stevens v. The Railroads*, 4 Fed. R. 97.

(b.) The appellants were parties to that case by representation in the person of the trustees under the deed of trust. That suit was brought for the purpose of determining the legal status of the property described in or sought to be conveyed by the deed of trust. And the Court decided in that case that the title to the property attached was not in the insolvent, but in the trustees under the deed of trust when the attachments were laid. *Mitford's Equity*, [167], 194, in ed. of 1876, page 259; *Story's Eq. Pl.*, sections 149, 207a, 207b, 216; *Kenison v. Stewart*, 93 U. S. 155; *Russell v. Lasher*, 4 Barb. 232; *Code*, Art. 16, sec. 160.

(c.) There is ample authority in Maryland for saying that even if appellants are not to be regarded as having been parties in the strict sense, either in person or by representation, to the case of *Riley v. Carter*, they are still estopped

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by the decree of the 28th of September, 1893, passed therein, because it is apparent from the record that they had full knowledge of the pendency of that suit and of the issues raised thereby, and had the right to be made formal parties thereto upon their own application. *Cecil v. Cecil*, 19 Md. 79; *Ches. & O. Canal Co. v. County Comrs.* 57 Md. 225; *Parr v. Cockey*, 71 Md. 235; *Albert v. Hamilton*, 76 Md. 311.

3. The fact that the deed of trust was voidable at the suit of the insolvent trustee, and was in fact, by said decree of 28th September, 1893, avoided at the suit of said insolvent trustee, did not let in the attachments of the exceptants or give them any lien or validity which they did not have at the time they were laid. It is the policy of the insolvent law of Maryland to avoid deeds of trust (made under the circumstances of the present case), for the sole purpose of bringing the assets of the insolvent under the jurisdiction of the Insolvent Court, to the end that a *pro rata* distribution thereof may be made in that case among his creditors. It would be contrary to equity, and would defeat the main purpose of the insolvent law to permit its operation in this case upon said deed of trust to give to the appellants, by virtue of their attachments, a preference over the other creditors of the insolvent, which, but for the operation of the insolvent law on said deed, the appellants would not have had. *Reed v. McIntire*, 98 U. S. 507.

4. The decree of the Circuit Court determined that an act of insolvency had been committed by J. H. R. Nicholson before he made the deed of trust. It is submitted that after he had, by such act, set in motion the insolvent law, it was not competent for him or any of his creditors to thwart or defeat the operation of the law; provided it was invoked, as it was in this case, by creditors, within four months after the commission of the act of insolvency. *Riley v. Carter*, 76 Md. 612; *Pfaff v. Prag*, 79 Md.

ROBERTS, J., delivered the opinion of the Court.

Some of the preliminary stages of this controversy will be found to have received consideration in the case of *Riley v. Carter and Aiken, trustees*, reported in 76 Md. 581. In that case, the decree was neither affirmed nor reversed, but the case was remanded for further proceedings under Art. 5, sec. 36 of the Code, in accordance with the views of this Court therein expressed. After the case had been remanded the Circuit Court of Baltimore City overruled the demurrer to the bill of complaint, and the defendants therein answered the same. At this juncture the counsel for plaintiffs filed orders with the Clerk of that Court directing him to enter the case dismissed as to all of the attaching creditors, but the same counsel continued in the management of the case representing certain co-plaintiffs, who were general creditors of Nicholson & Sons, and conducted said case to final decree. The legal effect of the manner adopted by counsel in seeking the dismissal of the attaching creditors as parties to said proceeding is a question on this appeal to be herein-after considered. In the further progress of the case in the Circuit Court of Baltimore City, replications were filed to the answers, and the case was heard upon the pleadings and testimony. The Court, by its decree, declared that the deeds of trust which had been executed by Johns H. R. Nicholson to Carter and Aiken, trustees, were *not fraudulent in law or in fact* as against the creditors for whose benefit the same were executed, but as against the claim of the permanent trustee in insolvency they were void and inoperative ; and said Carter and Aiken, trustees, were directed to deliver to said trustee in insolvency all the assets and property conveyed to them by said Nicholson, which they did: In accordance with the practice sanctioned by this Court in *Buschman v. Hanna*, 72 Md. 1, the trustee in insolvency intervened as claimant in all of the attachment suits and procured judgments in his favor, whereby the litigation under the attachments was transferred to the Insolvent Court for its decision. The trustee in insolvency, in accordance with

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legal requirement, transferred the assets received by him from Carter and Aiken, trustees, to the Circuit Court for Baltimore County, for distribution, where Nicholson had been declared an involuntary insolvent. An audit having been filed in said insolvent case, which distributed the assets thereof *pro rata* and without preference to the creditors who had proved their claims in said case, the attaching creditors filed objections to the final ratification of the Auditor's Account, on the ground that they were severally entitled to priority in the distribution of said assets and should not be dealt with upon the same equality as that of general creditors of said Nicholson & Sons ; and further, because the said deeds of trust were fraudulent in fact and presented no legal bar to their right to have judgments of condemnation entered in said attachment suits which would establish their right to preference in payment out of said trust fund.

The Circuit Court for Baltimore County overruled the objections to the Auditor's Account and ratified the same, and this appeal is taken from the order of that Court. Many interesting questions arise on this appeal, but it will not be necessary to give all of them consideration. Those which are requisite to a proper determination of the rights of the parties are few, but not free of some difficulty.

It will be proper in the first instance to consider the legal status of those attaching creditors, who, through the intervention of the plaintiffs below, had been made parties defendant in *Riley and others v. Carter and Aiken, trustees*, by an order of the Court based upon a petition of the plaintiffs, in which it is averred that, in consequence of said attachments, they were *necessary* parties. Nothing in the progress of the case occurred to render them less necessary parties, so far, at least, as the reasonable purposes of the cause indicate ; yet, after having remained parties litigant during the progress of this case on the appeal in 76 Md. 581, and until the demurrer filed to the bill of complaint had been overruled, plaintiffs' counsel, without the authority

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of the Court in which the case stood for hearing, filed with the Clerk of that Court two orders of the same date, one of which sought to dismiss the bill as to certain plaintiffs, and the other order sought to deprive the case of not less than sixty defendants by dismissing the bill as to them. This statement suggests a question of importance in the practice of Courts of Equity in this State, and one of consequence to the decision in this case. We have given it careful consideration, and we all agree that after the case had progressed to the extent it had, counsel for plaintiffs had no authority to file an order with the Clerk of the Court directing the dismissal of the bill as to certain plaintiffs or defendants, without having previously obtained the permission of the Court to make such an order. We cannot conceive of a practice better calculated to lead to unsatisfactory results than that followed in this case. After a bill has been filed and proceedings had under it, when counsel have appeared and costs have been incurred, it would be an unfair advantage to allow to the plaintiffs' attorney the right to dismiss his client's complaint as to parties, either plaintiff or defendant, without the previous sanction of the Court. Our practice of allowing amendments as to parties, would be practically nugatory and without purpose if the mode pursued in this case were to obtain.

Mr. Daniel, in his work on *Chancery Pldg. and Pr.* 790, says, "When there has been any proceeding in the cause, which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course; thus, where a *general demurrer has been overruled* on argument, Lord Cottenham was of opinion that the plaintiff could not dismiss his bill as of course." *Wiswell v. Starr*, 50 Me. 384; *Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green, (19 N. J. Eq.) 69. As having some bearing on this subject, it will be found by reference to the case of *Roberts v. Gibson, extr., et al.*, 6 H. & J. 117 (1826), that the names of certain parties had, by methods somewhat similar to those adopted in this case, been stricken out of the bill, but KILTY,

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CHANCELLOR, said, "that, with respect to the parties, he must consider those originally named as being *still the complainants*, notwithstanding the writing filed by one and the deposition by another, *inasmuch as they had not applied to the Court to be struck out of the bill.*" What would be the inevitable result if a practice different to that just indicated were allowed to prevail? Courts could never know with certainty who the parties actually were at any particular stage of the case, without looking to the record of proceedings to ascertain the fact whether the plaintiff's attorney may not have allowed a few plaintiffs and as many defendants permission to retire from the case, since the cause was last before the Court. The legal status of those creditors whose names appear in the two orders hereinbefore mentioned, and who sought thereby to escape the effect of the decree finally passed in said cause, has been in no respect changed or affected, but they are, for all legal purposes, concluded to the same extent as if said orders had not been filed with the Clerk of said Court, professing to dismiss the bill as to them. But independently of the views expressed, we have here a list of attaching creditors who were parties to the cause and fully advised of the nature and character of the controversy, who continued as such as long as they thought it beneficial for them to do so, and when they had reached a certain stage in the progress of the cause, the plaintiff's counsel, without the sanction of the Court, filed his order with the Clerk of the Court dismissing the bill as to said parties. Here is a case in which the creditors named had been by order of Court made parties because they were necessary to a just determination of the interests of all parties concerned. To tolerate such a practice would be, in effect, a substantial denial of the doctrine so often recognized by the Court, "that persons who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of their rights, are concluded by the proceedings as effectually as if they were parties named in the record." *Albert v.*

Hamilton, 76 Md. 311; *Robbins v. Chicago*, 4 Wall (S. C.) 672; *Parr v. Cockey*, 71 Md. 233. It follows from what has been said, that the attaching creditors are estopped from setting up in the Insolvent Court any defence, which was appropriate for them to have interposed in the Circuit Court of Baltimore City, or of now controverting any question which has been settled and determined by the decree of that Court. If they were aggrieved by the action of the Circuit Court of Baltimore City, an appeal to this Court was open to them. There are other questions in the record which do not now demand consideration and are not requisite to the decision of this case.

The order of the Court below, overruling the objections to the audit and ratifying the same, must be affirmed.

Order affirmed with costs.

(Decided March 26th, 1895.)

THE FROSTBURG MINING COMPANY *vs.* THE CUMBERLAND AND PENNSYLVANIA RAILROAD COMPANY.

Reasonable Facilities for Transportation—Making Switch Connection—Reviving Charter of Corporation—Repeal by Implication.

A statute providing that a certain railway company shall furnish reasonable facilities and all cars for receiving and forwarding coals offered for transportation, does not impose upon the company the obligation to permit other corporations having coal for transportation, to make connection by means of a switch with its road.

Where a statute provides that the charter of a certain company shall be continued in full force for the period of thirty years, such statute operates merely to revive and extend the charter of the company, and does not create a new and distinct corporation.

The charter of a railway company, granted in 1849, gave to any corporation, which might be *thereafter* incorporated, the right to make

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connection with the railway. The appellant corporation was chartered by an Act of Assembly *before* the railway company was created, and its charter expired in 1878, when an Act was passed continuing the Act of incorporation in force for thirty years. In 1876 a statute was passed amending the charter of the railway company, and providing that it should furnish reasonable facilities for the transportation of all coal offered. *Held,*

1st. That the Act of 1878 did not create a new corporation, and therefore the appellant was not entitled to make a switch connection with the tracks of the railway company, the appellant having been incorporated before the railway company.

2nd. That the Act of 1876 did not repeal by implication that provision in the charter of the railway company, by which its obligation to allow connections to be made by other corporations was limited to those thereafter created.

The repeal of a statute by implication is never favored in law, and it is only when two Acts are repugnant and plainly inconsistent with one another that the latter Act operates as a repeal by implication of the former.

Appeal from an order of the Circuit Court for Allegany County (BOYD, C. J., STAKE and HOFFMAN, JJ.), refusing to grant the injunction asked for in the bill of complaint filed by the appellant. The prayer of the bill was for an injunction prohibiting the defendant from further refusing to permit the plaintiff to put in and complete a switch connection between its railroad and the railroad of the defendant at the point selected by the plaintiff, and enjoining the defendant from thereafter refusing to furnish cars and transportation to the plaintiff for its coal over the defendant's road. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and ROBERTS, JJ.

Benjamin A. Richmond and D. James Blackiston, for the appellant.

E. J. D. Cross and Robert H. Gordon, for the appellee.

ROBINSON, C. J., delivered the opinion of the Court.

The question in this appeal is whether the appellant, a coal mining company, has the right to make connection by means of a switch with the appellee's railroad, which runs by or near the property of the appellant.

The appellee was chartered by Act of 1849, chap. 469, with power to build a railroad from Cumberland to the Pennsylvania line. By sect. 21 of its charter, privilege to make connection with the appellee's road was reserved to any corporation which might "*be hereafter incorporated*," provided that in making such connection no injury "*shall be done to the works of the company*." This privilege, it will be observed, is expressly limited to corporations chartered after the Act of 1849, incorporating the appellee.

The appellant was chartered by the Act of 1847, chapter 306, for the purpose of manufacturing iron and mining coal, and was authorized to build a railroad from its property to the Chesapeake and Ohio Canal, at Cumberland. Having been chartered prior to 1849, the appellant, it is clear, is not entitled to the privilege of making connection with the appellee's road, for the reason that this privilege was, by section 21 of the appellee's charter, reserved to corporations thereafter incorporated; that is, to corporations chartered since 1849. The contention, however, is that the appellant was chartered for a period of thirty years, and that its charter expired 8th March, 1878, and that by the Act of 1878, chap. 409, passed 5th April, 1878, a new corporation was created. So the question comes to this, whether the Act of 1878 is to be construed as creating a new corporation or as continuing or reviving the old company? "To ascertain," says MR. JUSTICE STORY, "whether a charter creates a new corporation or merely continues the existence of the old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporators." *Bellows v. Hallowell*, 2 Mason, 44. That is to say, whether the object of the Act is to prolong or revive the existence of a corporation which has expired

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or is about to expire, and not to change the identity of the company or to form a new one, or whether the object is to create a new corporation, with a new capital, and with no intention to continue the obligations of the old company as against the company thus created. What, then, was the object of the Act of 1878? Its title declares it to be "An Act to extend An Act entitled An Act to incorporate the Withers Mining Company, passed at the December session, 1847, chapt. 306," for the period of thirty years. And the enacting clause, sect. 1, provides, "That the Act entitled An Act to incorporate the Withers Mining Company, and passed at December session, eighteen hundred and forty-seven, chap. three hundred and six, and the Act to alter and amend said original Act of incorporation passed at January session, eighteen hundred and seventy, chapter two hundred and twenty-seven, be and the same are hereby continued in full force and effect for the period of thirty years.

Not only does the title declare it to be the object of the Act to extend the charter of the appellant for a period of thirty years, but the enacting clause provides in express terms that the charter be and the same is "hereby continued in full force and effect for the period of thirty years from the 8th March, 1878." It is clear, then, that the Legislature meant merely to revive and extend the charter of the appellant, and did not mean to create a new and distinct corporation ; and it is equally clear that this Act was so understood and accepted by the corporators themselves. In pursuance of its provisions a meeting of the stockholders was held at Frostburg on the 6th May, 1878, and the company was organized by electing all the officers of the old company, and although the name of the company was subsequently changed from the Withers Company to "The Thomas Mining Company," and then again to "The Frostburg Mining Company," the legal title to the property still stands in the name of the Withers Company. And in making these changes in the name of the company, the Legislature was careful to provide "that the company by

such name shall succeed to all the rights, powers, liabilities and obligations of the said Withers Mining Company." It is clear, therefore, that the object of the Act of 1878 was merely to revive and extend the charter of the Withers Company for a period of thirty years, and by no fair rule of construction can it be said to have created a new corporation.

But then, again, it is contended that section 21 of the appellee's charter, which restricts the privilege of making connection with its road to corporations chartered after 1849, is repealed by the Act of 1876, chapt. 64. This Act, in the first place, prescribes the rates to be charged by the appellee for the transportation of coal over its road, and then it provides that it shall be the duty of the appellee "to provide and furnish reasonable facilities, and all cars, including gondolas where required for local trade, and other vehicles and motive power for receiving and forwarding all coals that may be offered for transportation over said railway." And the argument is, that the duty of furnishing reasonable facilities for receiving and forwarding coal that may be offered for transportation, necessarily imposes on the appellee the obligation of permitting all persons and corporations having coal for transportation to make connection by means of a switch with its road.

To such a construction we cannot agree. The whole object of the Act was to fix the rates to be charged by the appellee for the transportation of coal, and, having fixed these rates, it makes it the duty of the appellee to furnish the means for *forwarding and delivering* the same. And reasonable facilities, as thus used, means that the appellee shall furnish the cars, motive power and other conveniences necessary for such purposes. It would be a strained construction to hold that these words in themselves repeal section 21 of the appellee's charter and impose upon it the obligation of permitting all persons and corporations having coal for transportation to make connections with its road. Such a construction is neither warranted by the natural im-

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port of the words, "reasonable facilities," nor the subject-matter in connection with which they are used. It might just as well be said, that the Legislature meant to impose upon the appellee the duty of making stations at such places on its road as the shippers of coal might deem convenient to themselves, without regard to the business or interests of the appellee.

These precise words are used in the Statute 17 and 18 Victoria, chapt. 38, passed in 1854, and which provides "That every railway company * * * shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways." And in construing this statute in the *Southeastern Railway Company v. The Railway Commissioners*, Queen's Bench Div., vol. 6, p. 586, the LORD CHANCELLOR said: "What then are the obligations imposed upon railway companies by this statute? First, a positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic, upon and from the several railways and canals belonging to or worked by such companies respectively." "Traffic (according to the interpretation clause, sec. 1), includes passengers and their luggage, goods, animals and other things conveyed by any railway company. Railway includes every station of or belonging to such railway used for the purposes of public traffic." * * * "With respect to stations there is no obligation to establish them at any particular places or place unless the company thinks fit to do so." BRETT, L. J.: "It follows that the defendants had jurisdiction only to hear and determine, and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic."

And in *Great Western Railway Company v. The Railway Commissioners*, Queen's Bench Div., vol. 7, p. 182, where the complaint was that the company had charged rates in excess of those authorized by law, COTTON, L. J., said:

"The complaint is simply that the charges made by the railway company for a great many of their journeys are beyond those which their special Act of Parliament or the general Acts allow them to charge, and in that sense and in that sense only are excessive. Now, the only question we have to determine is whether this comes within the words of the second section of the Railway and Canal Traffic Act of 1854, on a reasonable interpretation of those words. They are that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon their railway. Can this excessive charge be said to be a refusal of reasonable facilities? Now, what I think comes within those words, "'afford all reasonable facilities,' is the providing proper accommodation in the stations and in the carriages for the receiving and forwarding passengers and for getting them in and out of their carriages and the like."

The latest case in which the meaning of the words "reasonable facilities" has been considered, is *Darlaston Local Board v. The London and Northwestern Railway Company*, Queen's Bench Div., decided July 9th, 1894. In that case the railway company discontinued the use of a station and pulled it down, and an application was made to the railway commissioners for an order requiring the railway company to afford reasonable facilities for receiving, forwarding and delivering passengers and traffic on this branch line, and to reopen the station, the use of which had been discontinued. LORD ESHER, M. R., said that the commissioners had no power to "prevent a railway company from absolutely pulling down a station if they think they ought, or if they choose to do it, any more than they can order a railway company to build a new station."

And besides, there is nothing in the Act of 1876 by which it can be fairly inferred that the Legislature meant to repeal section 21 of the appellee's charter, which limited the right to make connection with its road to corporations thereafter to be incorporated. Section 1 of that Act pre-

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scribes the rates to be charged by the appellee for the transportation of coal, and having thus prescribed the rates, the next section makes it the duty of the appellee to furnish all reasonable facilities for the receiving and forwarding all coal that may be offered for transportation. These are the only amendments made to the appellee's charter. Not one word is said about amending or repealing sec. 21, by which the privilege of making connection with its road is limited to corporations thereafter to be incorporated. It can hardly be necessary to say that the repeal of a prior existing Act of the Legislature by implication is never favored in law, and it is only when the two Acts are repugnant and plainly inconsistent with each other that the rule applies. If the two Acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the later Act operates as a repeal of the former Act. In this case there is no inconsistency whatever between the provisions of the Act of 1876 and section 21 of the appellee's charter. On the contrary, the Act deals with other matters in no manner affecting the provisions of that section. And this being so, the doctrine of repeal by implication has no application. For these reasons the injunction prayed was properly refused, and the order of the Court below will therefore be affirmed.

Order affirmed.

(Decided March 26th, 1895.)

FRANK W. MISH, RECEIVER OF THE SURBRIDGE MANUFACTURING COMPANY, *vs.* MARTIN L. MAIN.

Fraudulent Transfer of the Property of an Insolvent Corporation to the President—Receivers—Replevin—Evidence—Protest by Notary.

The directors of a corporation, which was engaged in the manufacture of bicycles, made a sale of all the property of the corporation to the president thereof, who gave to each director his personal notes, payable in bicycles, for the shares of stock held by the directors respectively, at the rate of twenty per cent. of the par value. Under this arrangement the defendant, one of the former directors, received from the president a number of bicycles which were made from material on hand at the time of said transfer. The defendant knew that the corporation was hopelessly insolvent at the time of the sale of the assets to the president and the execution by him of his notes so payable in bicycles, in consideration of the defendant's shares of stock. Plaintiff was subsequently appointed receiver of the corporation, and brought an action of replevin to obtain said bicycles from the defendant. *Held*, that this transaction, if the above facts were found by the jury, was a mere contrivance to deprive the creditors of the corporation of their rights; that it was the duty of the receiver to avoid and nullify the same, and that the action of replevin was an appropriate remedy.

In the above-mentioned action evidence is admissible to show judgments against the corporation and mortgages executed by it, and that the directors knew that the company was insolvent; also to show the value of the property sold to the president, and the inadequacy of the consideration received for that replevied in this case, and that similar transactions had taken place between the president and a director other than the defendant.

Where one of the questions involved in the issue is whether a corporation was insolvent or not, evidence of a notary public that he had protested for non-payment commercial paper due by it is admissible.

Appeal from the Circuit Court for Washington County. This was an action of replevin brought by the appellant as receiver of the Surbridge Manufacturing Company of Washington County, against the appellee, to recover possession of seventy bicycles. The Surbridge Company was incorporated under the general law, on August 18, 1893, for the

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purpose of manufacturing bicycles, with a capital stock of \$50,000. The president and general manager was R. G. Surbridge, and the defendant, Main, was secretary and one of the directors of the company. At the trial, the plaintiff, after proving his appointment as receiver of the company, on February 19, 1894, and an order of the Circuit Court for Washington County authorizing him to institute this action, offered to prove that on September 28, 1893, the defendant, Main, together with the other directors of the company, made a sale of all the assets and effects of the company to the president, R. G. Surbridge, and by the terms of the sale Surbridge was to pay for the stock subscribed or held by the directors, at the rate of twenty per cent. of the par value of the same, by giving his personal notes to be paid in bicycles, which were to be made from material owned by the company prior to such sale and transfer of the shares of stock, and that the bicycles replevied in this action were manufactured by Surbridge out of such material and delivered to the defendant, Main. This proof was offered in connection with evidence that at the time of this transaction the defendant, Main, and the other directors, knew that the Surbridge Manufacturing Company was hopelessly insolvent, and that the bicycles replevied in this action were removed from the premises of the company at night, by order of Main. The refusal of the Court below (STAKE, J.), to admit this evidence, constitutes the second bill of exception.

The first exception was taken to the refusal of the Court to admit the testimony of a notary public, showing his protest for non-payment of negotiable paper due by the Surbridge Company.

The third exception was taken to the refusal of the Court to allow the foreman of the Surbridge Company to be asked how many men were employed by the company in the latter part of September, 1893.

The plaintiff further proved, that the cost of making a bicycle complete was about \$45, and the cost of one without tires, saddles and sprockets, about \$35; that 274 wheels

were made after Surbridge took charge in the early part of October, which were made out of material then on hand, there being at that time about a dozen manufactured wheels owned by the company, and that the bicycles replevied in this action were made from materials transferred to Surbridge in September. The plaintiff then offered to show that the sale of the said bicycles to the defendant was upon a wholly inadequate consideration, and that at the time of the transfer of the assets of the company to Surbridge the defendant knew that the company was entirely insolvent. The refusal of the Court to admit this evidence, forms the fourth bill of exceptions.

The plaintiff proved by S. M. Schindel that he was one of the directors of the company and had sold his stock to Surbridge for twenty cents on the dollar, taking his individual notes, which were of the following tenor: "Hagerstown, Md., Sept. 30, 1893. Thirty days after date I promise to pay to the order of S. M. Schindel twelve hundred and ten dollars in 30 bicycles. No saddles, or tires, or bags, or tools. Value received. R. G. Surbridge." The fifth exception was taken to the refusal of the Court to admit said notes in evidence, upon the proffer to show that the shares of stock of the other directors were sold to Surbridge upon similar terms, and that the bicycles replevied in this action were delivered in satisfaction of such notes so given by Surbridge to Main.

The plaintiff then offered in evidence a mortgage dated March 2, 1893, from the Surbridge Company to F. A. Baker, the defendant, Main, and others, covering the company's real estate and machinery, to secure the payment, on September 2, 1893, of the sum of \$6,000; also a chattel mortgage from said company of 300 bicycles, dated April 21, 1893, in consideration of \$6,000; also a bill of sale of certain machinery from said company to J. D. Main, dated August 7, 1893, in consideration of \$530; also a chattel mortgage from said company to the Prentiss Tool Co. for \$1,860, dated March 10, 1893. The refusal of the Court

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to admit said mortgages in evidence forms the sixth bill of exceptions.

The seventh exception was taken to the rejection of evidence offered by the plaintiff to show the recovery of judgments against the Surbridge Company at the February and May terms of the Circuit Court for Washington County.

The plaintiff then offered in evidence the books of the Surbridge Company, kept by the defendant, Main, for the purpose of showing that on September 30, 1893, the indebtedness of the said company amounted to \$19,556; and to the rejection of this evidence the eighth exception was taken. The plaintiff also offered to show that the entire assets of the company, not included in said mortgages, amounted in value to about \$3,500. At the close of the plaintiff's case the Court instructed the jury, at the instance of the defendant, that "the plaintiff has offered no legally sufficient testimony to entitle him to recover under the pleadings in this case, and the verdict must be for the defendant;" and to the granting of this prayer the plaintiff excepted.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Alexander Armstrong (with whom were *M. L. Keedy, Chas. A. Little, A. R. Hagner* and *T. A. Poffenberger* on the brief), for the appellant.

The plaintiff has admitted that Surbridge became the owner of the stock, and with it the personal property of the company, including the articles referred to in this action, all of which had been delivered to Surbridge by the directors and stockholders before the receiver was appointed; and that at the time of such delivery Surbridge was conducting the business of manufacturing bicycles in the name of the Surbridge Company, but not using any corporate formalities. These facts, of course, are to be taken in connection with the other facts offered to be shown by the plaintiff and

embodied in his exceptions. The sale made by the directors to Surbridge is directly assailed, and the illegal and fraudulent character of the sale is the gravamen of the plaintiff's cause. We hold: 1st. That such a sale as this was void. 2nd. That it was in contemplation of law a fraud on the rights of creditors. 3rd. That it was fraudulent in fact. 4th. That the sale, being void in law and fraudulent as against the rights of creditors, no title passed from the company to Surbridge. 5th. That as no title passed to Surbridge, the title remained in the company, and upon the appointment of the receiver it vested in him, and it was not only his right, but his bounden duty to the creditors whom he represented to assert at once ownership in the property, which was done by him in the replevin proceedings instituted in this cause. 6th. That if, however, it be supposed that Surbridge acquired any title from the company under his purchase, made as aforesaid, and that such a sale was voidable and not void, that the receiver would certainly not be without remedy, but in this form of action, as in any other proper proceeding, could take the property in the interest of creditors.

That such a sale is void, is shown by the following authorities: *Morawetz on Private Corporations*, sections 787, 788, 789 and 790; *Cook on Stock and Stockholders*, sec. 653; *Hoffman Steam Coal Company v. Cumberland Coal and Iron Company*, 16 Md. 456; *Beach v. Miller*, 130 Ill. 162; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Jones v. Mich. Co.*, 38 Ark. 17; *Sweeny v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 97; *Corbett v. Woodward*, 5 Sawyer, 405; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am Dec. 516.

Should, however, it be held that the sale to Surbridge stood until avoided, certainly the avoidance of the sale was open to be made in any proper proceeding at law, there being no reason why the issues involved in the insolvency of the company and the *bona fides* of the sale from the company to Surbridge should not be investigated before a

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legal tribunal. Is it to be said that questions of fraud can not be gone into in this forum? *Beach v. Miller*, 130 Ill. 162; *Keedy, admr., v. Moats*, 72 Md. 330.

Apart from authority, the question is one of very serious importance, as the grossest injustice might result to interested parties, if such a proceeding as this would not lie in behalf of a receiver of a corporation. A receiver of such a corporation is admonished that the assets of the company have been "passed around" among the directors, and he is made aware that he can recover them *in specie*, and secure the rights of the parties that he represents most effectively by taking the property in that form. What proceeding is there other than replevin to accomplish his purpose? It is speedy and it is sure; it arrests the property in the hands of an insolvent director or other party; it holds the property within the jurisdiction of the Court when it might be removed beyond the bounds of the State, beyond recovery, and beyond remedy, while the bond secures the amplest protection to any parties in whose possession the property may be found, and from whose possession it may be taken. The question of title is distinctly made, and the whole matter is open to be passed upon by the jury, with the aid of the Court, under instructions. *Perry v. Stowe*, 111 Mass. 60; *Beach v. Miller*, 17 Am. St. Reports, 293; 130 Ill. 62.

Fred. F. McComas and Wm. J. Witzenbacher, for the appellee.

The receiver lays claim to the possession of articles, as part of the assets of his trust, which are in the hands of a third party, and, even assuming the ownership thereof to have once been in the company, the receiver attempts to divest possession in such third party by reason of the prior insolvency of the company. No such rule has ever been adopted by the Courts, and no corporation or individual has ever been prohibited from disposing of its goods upon the ground of its insolvency. The present or prior insolvency of the company does not in any way reflect upon the right

of possession of the goods by the defendant, and any inquiry thereupon is clearly inadmissible.

If we now examine the proffer of testimony embodied in the second exception, we find the facts alleged to be an attempt on the part of the plaintiff to secure possession of the goods replevied upon the theory that the defendant held the goods under a transfer that was made with intent to delay, hinder or defraud creditors, and therefore void under the statute of 13 Elizabeth. Can such an inquiry be made in replevin proceedings? Clearly not. This is a proceeding before a Court of law before whom the matter of fraudulent transfers are not cognizable except in certain well-defined and limited instances. *Wanamaker v. Bowers*, 36 Md. 56.

The pleadings nowhere contain any allegation of fraud, neither in the declaration nor in the replication. In fact there is no suggestion anywhere that fraud is relied upon. Parol testimony to show fraud is entirely irrelevant unless there is an issue of fraud raised by the pleadings. *Timms and wife v. Shannon*, 19 Md., 312. Where fraud is relied upon it must be averred. *Showman and wife v. Miller*, 6 Md. 485. Fraud must be pleaded. *Cobbe on Replevin ss.*, §824, §781.

Where there is no allegation of fraud in pleadings, evidence to prove it will not be admitted. *Wesley et al. v. Thomas*, 6 H. and J. 25; *Hertle v. McDonald*, 2 Md. Ch. 129; *Gouvenieur v. Elendorf*, 5 Johns. Ch. 79; *James v. McKernon*, 6 Johnson, 42.

All of the proof is offered as tending to show the sale from the directors to Surbridge, and from him to Main, was fraudulent. It can be for no other purpose, for if these sales were valid, Main has a valid title and the receiver none. As evidence neither was nor could be offered to any other point; if offered to show the sales fraudulent, it is clearly inadmissible, as the proceedings will not admit testimony on this ground.

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ROBERTS, J., delivered the opinion of the Court.

This suit was brought by the appellant, as receiver of the Surbridge Manufacturing Company, to recover possession of a number of bicycles. The facts are sufficiently set out in the reporter's statement and need not be again repeated. The record contains nine exceptions, eight of which relate to the admissibility of the proof offered, and the ninth exception is taken to the granting by the Court of the appellee's prayer, by which the case was taken from the jury. It will not be necessary to examine in detail the various exceptions to the testimony offered, as most of them are closely analogous and can in most instances be considered together.

The first exception is taken to the appellant's offer to prove by a notary public the fact of his having protested for non-payment the negotiable paper of the Surbridge Company, and to prove how much of said paper he had protested and when the same had been done. One of the questions in issue in the cause was the insolvency *vel non* of the company. It has been repeatedly held in this State, and by the Supreme Court of the United States, that a merchant or trader who is unable to pay his debts as they become due in the ordinary course of business, is insolvent, *Castleberg v. Wheeler*, 68 Md. 277; *Toof v. Martin*, 13 Wall. 40; and if insolvent, how can the fact be better established than by one who has direct information as to the protest for non-payment of the company's negotiable paper. At common law the notary was a competent witness to establish the fact of the protest for non-payment of such paper. *Cookenderfer v. Preston*, 4 How. (U. S.) 317; *Johnson v. Harth*, 2 Bail (S. C.) 183. There is nothing in the law of this State which affects the notary's status as a witness, although it may have enlarged the scope of his special acts. This proof the appellant should have been permitted to give.

The second exception presents the same question already disposed of in considering the first exception, and in addition thereto the appellant offered to prove the facts set out in the statement of the reporter.

In seeking to establish a right to the possession of the bicycles in controversy, the appellant offers to prove not only that the company was hopelessly insolvent, but that the directors, and especially the appellee, had full knowledge of the exact financial status of the company, and yet, possessed of this information, the directors sold all of the property and effects of the company to Surbridge, after whom the company was named, and who was then a director in and president of the same, on the following terms of sale: Surbridge, the president and director of the concern, was to pay for the stock subscribed or held by the other directors at the rate of twenty per cent. of the par value of the same, by giving his personal notes, which were to be paid in bicycles, to be manufactured out of material bought by the company prior to such sale. That the bicycles manufactured by said Surbridge, as aforesaid, were delivered to the appellee and by him removed during the night-time from the premises of the company, and are the same replevied in this case. It is scarcely necessary to discuss a question of this character, as it speaks for itself, and the proof offered should have been admitted.

We fail to see the importance of the third exception. It is quite immaterial, so far as we can perceive, as to how many hands were working for the company, and we find no error in the ruling of the Court in refusing to allow the question to be asked.

The very gist of this action, as indicated by the appellant's offers of proof, is the fraudulent misconduct of the directors in effecting a sale of the company's effects to one of their own number, by which the rights of its creditors were utterly ignored and sacrificed. In this state of the case it was clearly competent for the appellant to show the actual value of the property sold to Surbridge and replevied in this case, as compared with the amount to be paid by him for the bicycles. This offer constitutes the fourth exception, and we think the testimony was clearly admissible.

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The fifth exception is taken to the refusal of the Court to permit the appellant to read to the jury the notes payable in bicycles, which the witness, Schindel, had accepted from Surbridge in payment of his stock in the company. Schindel had previously testified without objection, that he was one of the original incorporators of the company and one of the directors, who, together with others, had participated in the sale of the company's effects and property made to Surbridge, who had paid none of the purchase notes. We think the Court erred in refusing to allow the appellant to read these notes to the jury, for the reason that the controversy with the appellee is but part of a general intrigue to cheat and defraud the creditors of the company, and all of the directors who participated in the consummation of the fraud are in a greater or less degree affected by it. So that, whilst Schindel's notes were unmistakable evidence of his own misconduct, they were more. Taken in connection with the other proof in the record, they clearly demonstrate that they are only integral parts of a common design for wrong doing, in which the appellee is shown to have been an active participant.

It is only necessary to say the sixth, seventh and eighth exceptions should have been overruled. We think the mortgages, judgments and account should have been admitted. The issue here is one of fraud, and the proof offered is clearly applicable to the issue, and on that issue directly depends the right to the possession of the property replevied.

The admissions of the appellant receiver contained in the record do not affect or impair the rights of creditors, whose protection it was his duty to enforce. The assets of the company, insolvent as it manifestly is, must be applied, not to reimburse to directors any losses which they may have sustained, but they must in good faith be applied to the payment of the creditors of the company according to their respective legal rights.

It might as well be said here, at the conclusion of this

somewhat remarkable case, that it matters not how the assets of the company have been concealed, misappropriated or misapplied, it is the duty of the appellant receiver to strike down all disguises and contrivances which ingenuity has suggested, and which have been resorted to for the purpose of depriving the creditors of their legal rights, that the directors might profit thereby. In this case the remedy by action of replevin is appropriate and proper.

The instruction granted by the Court was, we think, erroneous, and should not have been granted. There was sufficient evidence before the jury for the case to have been submitted to them. Our conclusion is that the judgment below must be reversed.

Judgment reversed and new trial awarded.

(Decided March 26th, 1895.)

WILLIAM A. FISHER ET AL., EXECUTORS, &c., *vs.*
JAMES BOYCE, JR., AND OTHERS.

Caveat as to part of a Will—Estoppel to deny Validity of Will—Issues from Orphans' Court.

The Orphans' Court cannot send issues to be tried at law to determine whether a part only of a will was obtained by fraud or undue influence, when such part is not distinct and severable, and cannot be taken from the will without subverting its general scheme and purpose.

After a will had been admitted to probate, a bill in equity was filed by the executors against all parties interested for the construction of the same and the administration of the estate. The petitioners in this case were parties to the suit, and answered admitting the due execution, &c., of the will and codicil, and subsequently asked for an allowance from the income. Two years afterwards the petitioners alleged in the Orphans' Court that that part of the residuary clause,

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by which the testator directed that the sums charged against his children on his books should be treated as parts of their shares, and the codicil republishing the will, had been obtained by fraud and undue influence practised upon the testator, and asked that issues might be sent to a Court of Law to determine this question. *Held*, that the petitioners, under these circumstances, were estopped to deny the validity of the will, there being no allegation that since the probate thereof they had acquired knowledge of facts previously unknown to them respecting the issue.

Appeal from an order of the Orphans' Court of Baltimore County, directing the following issues to be sent to a Court of law for trial:

1. Was the provision contained in the paper-writing purporting to be the last will and testament of James Boyce, and therein set forth in the following words, that is to say : "And all the sums which have been charged by me, or by my authority, on any of my books of account or memoranda, against any of my children, or which may appear on memoranda made by me, and not yet entered into my books of account, shall be treated as parts of my estate, and the charges against each child shall be divided and treated as parts of the share of my estate set apart to such child, or to trustees for her and her issue," procured to be executed by undue influence practised upon him and operating upon and constraining the will of the said James Boyce, when he was, from feebleness of mind and body, unable to resist said undue influence ?

2. Was the provision contained in the paper-writing purporting to be a codicil to the last will and testament of the said James Boyce, in the language following, that is to say : "And I confirm my said last will and testament in other respects," procured to be executed by the said James Boyce as part of said alleged codicil by undue influence practised upon him and operating upon and constraining the will of the said James Boyce, when he was, from feebleness of mind and body, unable to resist said undue influence ?

The third and fourth issues repeated the above, propounding the question of fraud *vel non* instead of undue influence. The case is further stated in the opinion of the Court.

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The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

John P. Poe, Attorney-General, and Edgar H. Gans, for the appellants, cited Williamson v. Montgomery, 40 Md. 373; Jones v. Earle, 1 Gill 400; 1 Williams on Exors., 211; Rhodes v. Rhodes, L. R., 7 App. Cas. 198; Eedes v. Garey, 46 Md. 41; Barbour v. Mitchell, 40 Md. 161; Reilly v. Dougherty, 60 Md. 278; Bigelow on Estoppel, 673.

Charles Marshall and George Blakistone, for the appellees, cited O'Neill v. Tarr, 1 Rich. 80, 89; 1 Redfield on Wills, 374; Price v. Taylor, 21 Md. 356; Cain v. Warford, 3 Md. 462; Griffith v. Diffenderffer, 50 Md. 489; McIntire v. Worthington, 68 Md. 207; Mills v. Hume, 22 Md. 346; Barroll v. Reading, 5 H. & J. 175.

ROBERTS, J., delivered the opinion of the Court.

This appeal is taken from an order of the Orphans' Court of Baltimore County, transmitting issues to a Court of Law caveatting the will of James Boyce, late of said county.

Two questions are presented by this appeal:

First.—Had the Orphans' Court, under the circumstances of this case, any authority to order the transmission of the particular issues prayed for? and

Second.—Were not the appellees, by their antecedent conduct, estopped from contesting the validity of the will in controversy?

It is not contended by the appellants that the Orphans' Court had no authority to send to a Court of Law for trial, issues which contest the validity, either of the will and codicil in their entirety, or *separate and distinct* provisions thereof. But it is contended that there is no authority in law justifying the Orphans' Court in transmitting to a Court of Law an issue or issues which assail as fraudulent and void *certain parts of a will and codicil, which are not in themselves distinct and severable from the other parts.*

The particulars of this controversy are, that James Boyce,

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late of Baltimore County, deceased, departed this life, leaving a last will and testament in writing, dated the 9th of July, 1891, and also a codicil thereto, dated the 27th of July, 1891, both of which were, on the 6th of September, 1891, duly admitted to probate in the Orphans' Court of Baltimore County, and letters testamentary thereon granted to the appellants, who duly qualified as executors. On the 8th of January, 1892, the appellants filed in the Circuit Court of Baltimore City their bill of complaint against all the parties interested in the settlement of said estate under the provisions of said will and codicil, asking said Court to construe the meaning and effect of all the provisions of said will and codicil, and assume the administration and settlement of said entire estate, both real and personal. The bill was answered, and among others, by James Boyce, a son, and Catharine Harrison, a daughter of the testator, who are the appellees in this record. In their respective answers the appellees severally and unqualifiedly admit the due *execution, publication and probate* of said will and codicil. On the 26th of March, 1892, the Court, by its decree, assumed jurisdiction of the trust and took charge of the administration and settlement of the same.

On the 31st of March, 1892, the said Catharine Harrison, by her husband as next friend, filed her petition in the same cause, claiming that she was entitled under said will to the income on the one-sixth of the *residue* of said estate after paying certain legacies in said will provided, and praying a monthly allowance under the provisions of said will for maintenance pending the settlement of said estate. In the answer to said petition it was claimed that the petitioner had received a large sum of money from her father during his lifetime, amounting to not less than thirty-eight thousand dollars; that the debts, incumbrances and legacies would consume the greater part of the estate, and that her income, if any, from said residue, was then incapable of ascertainment. The petition and answer were heard on the proofs offered, and the petition dismissed. On March 12th,

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1894, the appellees filed their petition in the Orphans' Court of Baltimore County, in which they alleged that "the paper-writing dated the 9th of July, 1891, is in some particulars the *true* last will and testament of the said James Boyce; and the paper-writing dated the 27th of July, 1891, is in some respects a *true* codicil to said will," but that certain provisions of both said will and of said codicil were procured to be executed by said testator by undue influence and fraud. To a proper understanding of this controversy it will be necessary to quote here in its entirety the residuary clause of said testator's will, which mainly constitutes the contention in this case, and is as follows:

"It is my will that all the rest, residue and remainder of my estate, real and personal, situate in the State of Maryland and in other States, shall be divided by my executors into six parts (*and all the sums which have been charged by me, or by my authority, on any of my books of account or memoranda, against any of my children, or which may appear on memoranda made by me, and not yet entered into my books of account, shall be treated as parts of my estate, and the charges against each child shall be divided and treated as parts of the share of my estate set apart to such child, or to trustees, to her and her issue*), it being my purpose, as far as practicable, thereby to promote equality in the benefits which my children have derived and shall derive from my estate."

That which is included within brackets and italicized is the part of said clause which it is claimed by the appellees is fraudulent and void, as having been procured by the practice of undue influence upon the testator in the execution of the same.

It is also contended that the last line of the codicil, which reads, "and I confirm my last will and testament in other respects," was procured to be executed by the testator by the practice upon him of fraud.

We come now to the consideration of the first question arising on this appeal.

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Until the decision in the case of *Griffith v. Diffenderfer and wife*, 50 Md. 466, the practice had never been sanctioned in this State of allowing issues transmitted to a Court of Law to be so framed as to contest the validity of *certain parts* of a will without assailing the *entire will*. However, before the decision in this State, the same practice had long prevailed in the English Courts, notably in *Rhodes v. Rhodes*, L. R. 7 App. Cases, 198; *In goods of Duane*, 2 Sw. & T. 590; 1 *Jarman on Wills*, 413. Whilst the practice has been thus sanctioned, the doctrine of the cases is such that we are constrained to think it should be kept within well-defined restrictions. It doubtless may be in some instances the means by which good results may be accomplished in the detection of fraudulent impositions; but, yet, if not properly guarded, it is quite well calculated to destroy the harmony of a testator's dispositions and cause his will to directly misinterpret his just intentions.

The question to be considered and disposed of on this appeal has not received the approval of any of the English or American Courts, so far as we are informed, nor do we think it ought to receive the approval of this Court. From the facts already stated, it is apparent that the caveat filed in the Orphans' Court of Baltimore County does not seek to strike down the entire will of the testator, but is an effort to carve out of the residuary clause of the will only such parts thereof as conflict with the interests of the appellees. It is clearly manifest that the testator, by the use of the language against which the caveat is filed, sought to promote equality in the final disposition of his estate. This language does not present a proposition *distinct and severable*, but it is so interwoven with the general scope and purpose of the leading provisions of the will, that to eviscerate from the residuary clause the suggestive language contained therein, would be subversive of the objects which the testator has sought to make effective. On this point the observations of SIR JAMES HANNEN, in *Harter v. Harter*, L. R. 3 P. & D. 21, may be referred to: "Such a mode of deal-

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ing with wills would lead to the most dangerous consequences, for it would convert the Court of Probate into a Court of Construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come before the Courts of Law and Equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended."

The caveat to the codicil would seem to follow as the natural concomitant of the assault on the objectionable features of the residuary clause, as the language of the codicil is in direct terms a republication of the will. In what we have said, we have dealt sufficiently with the subject as not to require further comment.

With respect to the question of estoppel, which is the second question raised by the appeal, we think, in the present state of the record, the appellees have by their conduct denied themselves the right to institute these proceedings. "A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights and of the facts, determines his election and works an estoppel." * * * "It is an old rule of equity, that one who has taken a beneficial interest under a will, is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any

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right or claim of his own, however legal and well-founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will." *Bigelow on Estoppel*, 562. If, however, a party has acted in ignorance of the *true* state of facts, he will not, on discovering the truth, be bound by his previous conduct, based upon a state of case essentially different from that which had controlled or influenced his prior action. In the case under consideration, the record does not show that the appellees, since the will and codicil were admitted to probate, have obtained knowledge of facts previously unknown to them; in fact, have since the institution of those proceedings ascertained that the testator was, by fraud or undue influence, induced to execute said papers as testamentary dispositions of his property. It is a maxim in a Court of Equity not to permit the same person to hold under and against a will. *Herbert v. Wren*, 7 Cranch. 378. We think this rule should not in its application be limited to Courts of Equity, as it is equally appropriate to the jurisdiction and practice of Courts of Law. If the appellees claim under the will of their father, they must give it effect as far as they can, and they will then be estopped from denying its validity and genuineness. *Waters' Appeal*, 35 Pa. St. 523; *Thrower v. Wood*, 53 Ga. 458. This rule does not, of course, apply in cases, as hereinbefore explained, where the party objecting to the will has previously assented thereto without knowledge of the circumstances attending the execution of the will. It follows from these views that the order of the Orphans' Court of Baltimore County must be reversed and the petition of the appellees be dismissed.

Order reversed and petition dismissed with costs.

(Decided March 26th, 1895.)

JENNIE COCHRANE *vs.* THE MAYOR AND CITY COUNCIL OF FROSTBURG.

Liability of Municipal Corporation for Injury by Cattle Running at Large.—Nuisance.

When a municipal corporation has the power to abate a nuisance, it is liable to persons injured in consequence of its failure to exercise such power.

The Mayor and City Council of Frostburg is authorized by its charter to pass and enforce ordinances to remove nuisances from its streets, as well as regulations necessary for the peace, good order and safety of the city. In an action against the municipality, the declaration alleged that the defendant permitted large numbers of horses and cattle to run at large upon the streets, and had failed to pass any ordinances to remove such nuisance and source of danger; and that while plaintiff was walking in a street of said city, she was attacked and trampled upon by a cow so running at large and greatly injured. Upon a demurrer to the declaration, *Held*,

- 1st. That under its charter the defendant had the power to prevent cattle from running at large within the corporate limits, and that it was its duty so to do if the allegations of the declaration were true.
- 2nd. That if the animal by which the plaintiff was injured was on the street without any fault on the part of the owner, then the defendant is not liable; for a municipal corporation should not be held to a higher degree of liability for injuries done by domestic animals than the owners thereof.
- 3rd. That the defendant would not be liable unless it could have prevented this animal from running at large by the exercise of ordinary care.
- 4th. That if the animal causing the injury to the plaintiff was on the street for so short a time that it could not have been discovered by the defendant's officers by the exercise of reasonable diligence before it attacked the plaintiff, then the defendant would not be liable, unless the cow's running at large can be attributed to the failure of the defendant to pass and enforce ordinances to prevent cattle from running at large.

Appeal from the Circuit Court for Allegany County. The case is stated in the opinion of the Court.

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Argument of Counsel.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

Robert R. Henderson and Benjamin A. Richmond for the appellant.

(1.) It is clear that the municipality of Frostburg had power to abate nuisances. The language of its charter is clear and explicit. It is given ample power over nuisances *eo nomine*, and the "general welfare" clause is also broad enough to cover nuisances. This is not denied by defendant, but the contention is made that the acts complained of do not constitute the sort of a nuisance which is covered by the general nuisance powers.

(2.) The act complained of—the permitting of animals to run at large under the conditions and in the manner set out in the declaration is a nuisance, and it is such a nuisance as the city had power to abate. The defendant insists that the nuisance for which the city can be liable must be a nuisance at common law, and that this one is not a common law nuisance. Without admitting this, we inquire, what, then, is a common law nuisance? Is it one which has been declared to be a nuisance by some decision at the common law? Yes; but it is not that alone. We assert that reason and principle declare that act to be a nuisance which comes within the common law definition of a nuisance, whether any decision can be produced declaring it so or not. The act or thing which contains the essential elements of a nuisance, as defined by the common law, is as much a nuisance as if it had been decided to be so in an adjudicated case. The test is not whether the Judges have said a particular thing is a nuisance, but whether it has those attributes which make up a nuisance.

If we take the broad definition of nuisance at common law, and apply it as the cases arise, we shall find that it adapts itself to the ever-changing necessities and conditions of life; it is just as serviceable now as it was when first adopted; it is expansive enough to embrace all those new forces and

agencies which modern ingenuity and scientific investigation have added to the list of man's implements, and to exclude those things formerly harmful which have now been made harmless or even beneficial. If only those things which the common law had *in toto idem verbis* declared to be nuisances can be abated by a municipal corporation under its general powers, then a live electric wire in the streets of a populous city is not a nuisance, and the manufacture of glass is; a steam locomotive engine running at full speed through the streets of a city is not a nuisance, but a brewery is.

(3.) The question of what constitutes a nuisance is one of law for the Court. *Wood on Nuisance*, 2nd ed. sec. 22; *Taylor v. Cumberland*, 64 Md. 68.

(4.) It follows that the Court can, in applying the principles of the common law, decide those things to be nuisances which come within those principles, whether they have ever been decided to be a nuisance before or not, and when so decided they are common law nuisances. Coasting on the public streets had never been decided to be a nuisance until *Taylor v. Cumberland*, 64 Md. 68, so held, and the city's powers in that case were no more specific and no broader than in the case at bar. So of ice on sidewalks. *Marriott's case*, 9 Md. 160. In *Commonwealth v. Curtis*, 9 Allen (Mass.) 266, the Court holds that a municipality has power under the general authority given it over nuisances to pass an ordinance prohibiting swine from going at large upon the public streets. *Commonwealth v. Patch*, 97 Mass. 221.

Do the acts here alleged constitute a nuisance? In the environment set out in the declaration, they certainly do. Frostburg is a populous town of upwards of five thousand inhabitants, and while cattle running at large might not be a nuisance in the country, they certainly are in a town. They are dangerous to life and limb, being provided with horns and hoofs, which it is their nature to use. They are subject to sudden panics and become uncontrollable. They

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are easily excited to anger, especially by the color red. They make loud and unseemly noises. They soil the streets and sidewalks and are in the way of persons passing. They frighten women and children. If all the owners of cows, pigs and horses and other beasts in Frostburg were to allow their animals to go upon the streets, as they have the right to do under the present ordinances, the streets would become impassable for people.

Most, if not all of the cases cited at bar by the defendant, proceed upon a doctrine of law entirely inconsistent with *Marriott's case* and the long train of decisions confirming it. It is the doctrine that "unless there be a valid contract creating, or a statute declaring the liability, a municipal corporation is not bound to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons, which would otherwise not have happened." *Dillon Municipal Corporations*, 4th ed. sec. 950, 951. Many States have adopted this principle, amongst them Georgia and New York, but it is impossible to reconcile this with the well-settled and repeatedly reaffirmed doctrine of *Marriott's case*, "that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority,' in such case, may be construed duty and obligation." 9 Md. p. 174.

David W. Sloan and A. A. Doub, for the appellee.

Two classes of powers are granted to the corporation of Frostburg, one "to provide for the comfort, good order, health and safety of the town, and of the people and property therein," and the other "to remove nuisances and obstructions from the streets, lanes and alley, and from adjoining lots," and the right of the plaintiff to recover in this case must come from a failure on the part of the corporate

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authorities to exercise one or other of these powers. It cannot be maintained that the running at large of cattle upon the streets of the town is a nuisance as defined by the charter of Frostburg. The running at large of cattle upon public highways is not a common nuisance, because it is authorized in this State by the common law. "Nothing is a public nuisance which the law, either common or statute, authorizes." *Cooley's Const. Limitations*, p. 741, note 2.

If the municipality should assume to declare something which was entirely lawful by the laws of a State to be a nuisance, the declaration would be a mere nullity, because in conflict with the superior law. *Cooley's Const. Limitations*, p. 741, note 2.

A charter which confers upon the common council full power and authority to remove and abate any nuisance injurious to public health or safety, etc., does not confer upon the council the exclusive jurisdiction to determine what constitutes a nuisance, but only authorizes the abatement of that which is in fact a common nuisance. Unless a nuisance as defined by the common law or statute exists, the act of the common council can not make it one by mere resolution. *Hennessey v. St. Paul*, 37 Fed. Rep. 565; 1 *Dillon's Municipal Corporations*, sec. 374, note. Power conferred on municipal corporations to enact such ordinances as it shall deem necessary for the well-regulation, interest, health, cleanliness, convenience and advantage of the corporation, and to require and compel the abatement of nuisances, does not authorize the municipality to pass an ordinance prohibiting swine, cattle, horses and so forth from running at large in contravention of the general law of the State, which allows such animals to run at large. It is the practice expressly to grant power to towns corporate to do what in this case has been attempted to be done. Such being the practice, it is right to presume where this is not expressly granted, it was intended it should not be exercised. *Collins v. Hatch*, 18 Ohio, 523.

Where a city council passed an ordinance forbidding the

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running at large of cattle in its streets, and subsequently suspended its operation, one who is gored by a cow running at large has no cause of action against the city. *Rivers v. Augusta*, 65 Ga. 376; *Dillon on Mun. Corp.*, sec. 950.

Municipal corporations are not liable for failure to pass ordinances which are discretionary, but are liable if the duty is a ministerial one, for the omission in the first case would transfer the discretion from the body to which the law has committed it to Courts and juries. *Wilson v. New York*, 1 Denio, 595. "It has never been established, and cannot be held, that a hog or other animal running at large is a nuisance in the legal sense of that term. * * * * * The only correct conclusion seems to be, that although such animals may occasion inconvenience and annoyance by running at large, yet they are not *per se* nuisances, but are subject only to such regulation as municipal authorities may determine." *Kelley v. City of Milwaukee*, 18 Wis. 86.

BOYD, J., delivered the opinion of the Court.

The appellant sued the appellee for injuries sustained by her being horned, tossed, thrown down and trampled upon by a cow, which attacked her while she was walking along a lane or street of Frostburg. The defendant demurred to the declaration, and the demurrer was sustained by the Court below and judgment entered for the defendant. From that judgment this appeal was taken, and we are therefore to inquire into the legal sufficiency of the declaration and determine whether the facts therein stated, which are admitted by the demurrer, give the plaintiff a right of action.

It is alleged that the defendant was, by its charter, vested with control over all the streets, lanes and alleys of Frostburg, and with full power to provide, by the passage and enforcement of ordinance, for the comfort, good order, health and safety of all the inhabitants of said town, residing within the limits and passing along and over its streets, lanes and alleys, and with power to prevent and remove all nuisances in said town, and to shield and protect said inhabitants there-

from ; that the said town is laid off into streets and alleys, contains between four and five thousand inhabitants, and is compactly built, so that there is a great deal of travel and walking on said streets and alleys.

It is further averred that large numbers of horses, cows, hogs and horned cattle were turned loose and permitted to run at large upon the streets unattended during the day and night, by means of which "said stock, and particularly said cows (they being armed with dangerous horns and equipped with annoying bells), became a common nuisance and a source of great annoyance and danger to persons passing along said streets and alleys, and particularly so as to women and children, who were attacked and frightened by said stock, whereby the safety and comfort of the inhabitants and the good order of said town were destroyed, and whereby the same became and (at the time of the grievances herein-after set out) was a common and notorious nuisance and a constant source of dangerous discomfort to the inhabitants of said town."

It is then charged that, by reason of the powers contained in the charter, it became the duty of the defendant to pass and enforce ordinances to abate and prevent said nuisance, and to prevent said animals from running at large and require their owners to keep them off the streets, unless attended by some person in charge thereof ; but that the defendant, unmindful of its duty, negligently and wrongfully failed and refused to pass any such ordinances for the preventing and abating said nuisance, and negligently, wilfully and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said streets, and that while said nuisance still continued, plaintiff was walking on a street or lane of said city, using due care and caution, and was attacked by one of the said cows and horned cattle so by the said defendant negligently and wrongfully allowed and permitted to be at large upon the said streets, and was violently horned, tossed, thrown and trampled upon, etc.

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The injuries sustained by plaintiff are then set out in detail, showing that both of her arms were broken, her side torn and that she was otherwise seriously and permanently injured.

If the defendant can be held responsible in any case to one lawfully using its streets for injuries inflicted by a cow running at large, the allegations in this declaration are certainly sufficient to entitle the plaintiff to recover, if she can sustain them by competent proof. In determining whether the defendant is so liable, we will consider:

1. Has the Mayor and City Council of Frostburg power under its charter to prevent stock from running at large within the corporate limits?

2. If it has such power, what are the consequences of its neglect or failure to do so?

Art. 2, sec. 144 of the Code of Public Local Laws, authorizes the Mayor and City Council of Frostburg to pass such ordinances, not contrary to law, as they may deem beneficial to the town; gives them power to remove nuisances and obstructions upon the streets, lanes and alleys, and to ordain and enforce all ordinances, rules and regulations necessary for the *peace, good order, health and safety* of the town and of the people and property therein, and authorizes them to impose fines, forfeitures or imprisonment for the violation of any ordinances of the town.

These powers are in substance the same as those of the charter of the city of Cumberland, which were passed upon in the case of *Taylor v. Mayor, etc., of Cumberland*, 64 Md. 68. This Court there held that the defendant was authorized and required under its charter to prevent persons from coasting on the streets, if it could do so by ordinary and reasonable care and diligence, and declared such use of the streets to be a nuisance. There was no special authority given in the charter of Cumberland to prevent coasting on the streets, but the power of the city to do so was not only not questioned, but was expressly recognized in that case. If a municipality can, without express powers in its charter,

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prohibit the use of its streets for coasting, why should it not have the power to prohibit the use of them by horses, cows, hogs and horned animals, "during both the night and in day-time, and at all times, and on Sundays," as it is alleged in the declaration, especially when the cows are "armed with dangerous horns and equipped with annoying bells?" It is difficult to imagine a condition of things more calculated to injuriously affect, if not destroy, "the peace, good order, health and safety of the town and of the people and property therein," than that described in the declaration.

It is true that the decisions are not uniform as to whether what is called "the general welfare clause," usually contained in charters, authorizes municipal corporations to restrain domestic animals from running at large, but many of them so hold. *See 15 Am. and Eng. Ency. of Law*, 1188 and note, where a number of them will be found collected together.

There can be no good reason assigned why it should not, unless there be some statute law or some other provision of the charter inconsistent with such construction. In those cases in which it is held that municipal corporations cannot, without special authority, pass and enforce ordinances of this character, it will generally be found upon examination of them, that it is by reason of some statute or other special cause that would not apply to the case under consideration. For example, in the case of *Collins v. Hatch*, 18 Ohio, 523, so much relied on by the learned counsel for the appellee, the Court said that an ordinance to restrain horses, cattle, swine, etc., from running at large could not be adopted under the general welfare clause, as it would be in contravention of the general laws of that State, which allowed such animals to run at large. Is it to be said that the owners of horses, cows and other animals can turn them loose in the public streets of a town such as described in the declaration, and the authorities have no means to prevent it, unless the Legislature has given them express

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power? It is not necessary to determine whether domestic animals can be *impounded and forfeited* without express authority being given in the charter, but with powers as broad as those in the charter of defendant, there would seem to be no valid reason why it could not pass and enforce ordinances prohibiting stock from running at large and imposing penalties for the violation of them. If the owners of cows and horses tied them along the public streets of Frostburg, so as to interfere with the free passage of people having the right to use the streets, it could not be successfully contended that the authorities were without remedy. Why, then, should they be permitted to turn them loose, thereby not only obstructing the free and proper use of the streets, but permitting them to wander over the sidewalks, to frighten and possibly injure women and children.

It was contended by the appellee that it is customary in this State to grant special powers to such municipal corporations as desired to prevent stock from running at large, and hence, when it is omitted from a charter, the presumption is that it was not intended by the Legislature that such power should be exercised. We do not think that such a conclusion can properly be drawn. Various reasons might be given for such omission. Some of those municipalities may have been so disturbed by animals running at large, that they wanted to emphasize that power to restrain them, or they may have thought it safest to include such powers to avoid any question.

In the brief for appellee certain towns are named which have the power expressly granted them to prevent cattle from running at large, and it is stated that Hagerstown, Frederick and others have no such powers conferred on them. It would seem to be a most unreasonable construction to place upon the action of the Legislature, to say that, inasmuch as it has granted this express power to some towns of the State, but has omitted it in the charters of Hagerstown and Frederick, therefore these two cities, which are among the largest in the State, were intended by the

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Legislature to be prohibited from exercising such powers. There may be no such provision in the charter of Baltimore City, yet it would scarcely be claimed that it could not prohibit stock from running at large under the general powers vested in it.

The object of such a provision, as the general welfare clause, is to cover those cases not specifically designated. It would be impossible to enumerate in detail, in a charter of ordinary length, all the powers that a corporation could exercise. The very effort to name them all might exclude some that were omitted, but would have been authorized under the general welfare clause if an attempt had not been made to itemize them. We think it clear that the defendant has the power under its charter to pass and enforce ordinances to prevent stock from running at large within its limits, and that the condition of affairs described in the declaration is a nuisance of such character as should be abated for the peace, good order and safety of the people and property of the town.

It becomes necessary, therefore, to consider the second inquiry above suggested, namely, what are the consequences of the neglect or failure of the defendant to exercise its powers. We have been referred to a number of authorities outside of this State, to the effect that a municipality is not liable for the injuries sustained by reason of its failure to abate a nuisance, although it has power to do so. But that is no longer an open question in this State. It was said in *Marriott's case*, 9 Md. 174, that when a statute conferred a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority," in such case, may be construed "duty and obligation." It was there held that the city of Baltimore was required to pass ordinances sufficient to reach the exigencies of the case, and was bound to see that they were enforced. MASON, J., in delivering the opinion in that case, said: "The people of Baltimore, in accepting the privi-

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leges and advantages conferred by their charter, took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of those burthens was the obligation to keep the city free from nuisances. A disregard of the obligations thus imposed would be attended with the same consequences which would result to the individual at common law, were he to disregard his obligations to the community in these particulars. As the duty is the same in a corporation as an individual, so are the consequences the same for its disregard." On page 175 the Court quotes with approval from case of *Pittsburg v. Grier*, 22 Pa. 65, that "It is no matter whether that duty (removing a nuisance) remains unperformed, because it had no ordinances on the subject, or because, having ordinances, it neglected to enforce them. The responsibilities of a corporation are the same in either case."

In *Taylor's case, supra*, it was held that the corporation was under an obligation to exercise for the public good the powers conferred on it by its charter, to prevent nuisances and to protect persons and property. So, whatever may be the law elsewhere, it is well settled in this State that a corporation, having such powers, must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damage therefrom, who is not himself in fault. Of course, as was said in *Taylor's case*, if it use ordinary and reasonable care and diligence to prevent the nuisance, its duty is discharged and it is relieved from responsibility, and a vigorous effort to enforce its ordinance on the subject would fulfill its duty in this respect.

The declaration alleges that defendant "negligently and wrongfully failed and refused to pass any such ordinances for preventing and abating said nuisance, and negligently, wilfully and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said street." Now, if it be true, as is alleged in the declaration and admitted by the demurrer, that women and children had been attacked and

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frightened by these animals thus running at large in the streets, it would seem clear that it was the duty of the defendant to take some steps to prevent it. It is certainly its duty to prevent such a condition of affairs as is described in the declaration.

But the main difficulty in this case is to determine how far the defendant is responsible for such an injury as that complained of by plaintiff. It is well settled that the owner of a domestic animal is ordinarily not responsible for injuries inflicted by it, unless it is of a ferocious or vicious disposition, accustomed to bite or attack mankind, and he knows that it has such disposition or vicious propensity. "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities," and it is incumbent upon the owner to see that no injury is done by it. There is another class of cases in which owners have been held liable, without proving knowledge by them, on the ground that the animals were wrongfully in the places where they did the mischief. It has, for example, been held that the owner of a horse, who permits it to go at large in the streets of a populous city, is answerable for a personal injury done by it to an individual without proof that he knows the horse is vicious. The owner had no right to turn the horse loose in the streets. *Goodman v. Gay*, 15 Pa. St. 188; *Decker v. Gammon*, 44 Maine, 322; *Dickson v. McKoy*, 39 N. Y. 400; *Barnes v. Chapin*, 4 Allen, 444. This last case places the liability on the ground that the owner was in fault in permitting his mare to go at large on the highway without a keeper. See also *Mosier v. Beale*, 43 Fed. Rep. 358, in which it was held that in an action for personal injury caused by defendant's cow, it was not necessary to allege *scinter* when it is alleged that the injury is committed while the cow was negligently permitted by defendant to trespass on plaintiff's premises. In the case now under consideration, if the owner of the cow negligently or wilfully permitted her to go at large on the streets of Frostburg, he was in fault and was liable for injuries done by her to persons lawfully using

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the streets. Let us therefore apply these principles and determine how far the defendant is liable. We have already said that the defendant had the power, and it was its duty to prevent such a condition of affairs as the declaration alleges existed at the time of the injury. Of course, the ringing of cow bells, frightening women and children and other things alleged, which were annoying and injurious to the public at large, do not give the plaintiff a right of action, as she can only recover, if at all, for *special* injuries sustained by her. Those *special injuries* were not sustained by the ringing of cow bells, etc., but by the attack of this particular cow. These other matters are relevant, however, to our inquiry, because they are of such character as must likely have brought this nuisance to the attention of the authorities, and hence reflects upon their duty to abate the nuisance. In *Taylor's case* it would not have been contended that if the sled which struck him had been the only one coasting on the streets of Cumberland, the defendant would have been liable. It was because coasting had been carried on to such an extent that the city authorities were called upon to stop it as a nuisance and something dangerous to those lawfully using the streets. So in this case, if horses, cows, hogs and horned cattle were permitted by the town authorities to run at large as alleged in the declaration, they were called upon to put a stop to it. If, however, this cow that injured the plaintiff was on the street without any fault of the owner, then no blame can attach to the defendant and it would not be liable, for it would not do to hold a municipal corporation to a stricter liability for injuries done by domestic animals than the owners themselves would be held to. Nor would the defendant be liable, unless it could have prevented this cow from running at large by the use of ordinary care and diligence. If the cow was at such a place and for such short time, as it could not have been discovered by the defendant's officers by the use of reasonable care and diligence, before it attacked plaintiff, then the defendant would not be liable, unless the cow's

running at large can be attributed to the failure of defendant to pass and enforce ordinances to prevent stock from running at large. Of course, if the plaintiff is shown to be in fault, another defence would arise. Whether or not the plaintiff can prove such facts as will entitle her to recover, can only be determined at a trial of the case, but we think the allegations in the declaration are sufficient to require the defendant to plead, and therefore the demurrer should have been overruled. For these reasons we must reverse the judgment.

Judgment reversed and new trial awarded.

(Decided March 26th, 1895.)

JOSEPH H. RIEMAN *vs.* THE BALTIMORE BELT RAILROAD COMPANY AND OTHERS.

Deeds.—Description of Boundaries.—Binding on Street.

In a deed executed prior to the Act of 1892, ch. 684, the lot was described as beginning at the southeast corner of Howard and German streets; running thence easterly on German street, &c., and the last line was described as running northerly, bounding on Howard street, to the place of beginning. *Held*, that the beginning point was placed on the east side of Howard street and not at the centre of the street, and that no portion of the bed of that street was conveyed by the deed.

Where one end of a line is fixed on the side of a road or street, the line will be considered a straight line, and the other end will be considered as also fixed on the side of the road.

Appeal from the Baltimore City Court. This was an action of ejectment brought by the appellant, Joseph H. Rieman, for the purpose of endeavoring to oust the Belt Railroad Company from a portion of the bed of South How-

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ard street, which it is now occupying with its tunnel. The appellant is the owner in fee of a lot of ground situated on the southeast corner of German and Howard streets, in the city of Baltimore. Howard street runs north and south, and German street runs east and west. The Rieman lot fronts twenty-five feet on German street and runs southerly along Howard street from German, of an even width, eighty feet, to a nine-foot alley. The Belt Railroad tunnel runs north and south, underneath the bed of Howard street, along the whole front of the Rieman property. In front of the Rieman lot the bottom of the tunnel is forty-five feet, and the top fifteen feet beneath the surface of the street. At this place the tunnel occupies a strip of the bed of Howard street sixteen feet seven inches wide, east of the centre line of the street. The traffic on the surface of the street is undisturbed by the location of the tunnel. The appellant claimed to own to the centre line of Howard street, and therefore contended that the tunnel was on his land (subject to street uses), to the extent of occupying the strip, sixteen feet seven inches wide, beneath the surface, along the whole front of his lot. Howard street, at this point, is eighty-two feet wide between the building lines.

At the trial the plaintiff offered in evidence all the title deeds, beginning with the patent from the State. The Court below (WRIGHT, J.), rejected the prayers of the plaintiff and granted the prayer of the defendant, instructing the jury, that under the deed from Deborah Hoffman (set forth in the opinion of the Court), the plaintiff was not entitled to recover.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Arthur W. Machen and George R. Willis, for the appellant.

We believe it is not disputed that the land granted in fee by the patents included half of the bed of Howard street. That it was the *intent* of the subsequent conveyances to

make the western boundary line coincident with the western boundary line of the patent, and not to leave title in any of the grantors to a strip of ground between the building line and the centre line of the street, we think is perfectly manifest. If such intent has been adequately manifested in the deeds, the plaintiff is entitled to recover. By the prayer of the defendants, which the Court granted, the defence was rested wholly on the supposed failure of the description in the deed of the fee from Deborah Hoffman to The Corporation for the Relief of the Widows and Children of the Protestant Episcopal Church, dated 24th January, 1839, to carry the lot conveyed to the centre line of Howard street.

1. We submit that it is no longer open to question in Maryland that a call to bound on a public highway carries the conveyance to the centre of it. *Gump. v. Sibley*, 79 Md. In the deed in question, the call for the terminus of the third line is *Howard street*, which means the centre line of the street. The description of the fourth line is, if possible, yet more explicit—"and thence northerly bounding *on Howard street*."

It has seemed to us impossible, without entire disregard of the authority of the decision above referred to, and indeed without disregard of all the decisions of this Court upon the subject, to say nothing of Chancellor Kent's rule, 3 Kent Comm. 433, and of the weight of all the modern authorities, English and American, to hold that "bounding on Howard street" can mean anything else than bounding on the *centre line* of the street. Judge Wright, in granting the defendants' prayer and rejecting the plaintiff's prayers, assumed that the beginning of the lot was at the intersection of the *south and east sides* of German and Howard streets, and then, adopting the view taken in the old Massachusetts case of *Sibley v. Holden*, 10 Pick., 249, located the fourth line as bounding on the east side of Howard street, so as to get back by one straight line to such place of beginning. But, with the greatest respect, such a construction violates *two* fundamental rules of location law. In

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Argument of Counsel.

the first place, "the southeast corner or intersection of Howard and German streets," is not the intersection of the eastern line and south line of those streets respectively, but of the streets themselves; and the streets as boundaries, being units in legal intendment, the intersection of the streets is the intersection of the centre lines of the streets. Secondly. Even if it be assumed that the place of *beginning* of the lot is at the intersection of the south side of German street and the east side of Howard street, the end of the third line is at the centre of Howard street, by force of the call—"to Howard street." Therefore, the beginning of the fourth line is at the centre of the street, and the line must be run from that point, according to the fundamental principle of law as established from time immemorial in this State. Nor is there any room for doubt as to the location of the fourth line, which, starting thus in the middle of the street, runs "thence northerly, bounding on Howard street," that is to say, on the centre line of the street. "On Howard street" is a *call*—just as much so as a monument designated as the end of the line. *Dorsey on Ejectment*, 67; *Pennington v. Bordley's lessee*, 4 H. & J. 457.

The mere mention of a fixed point on the side of a road as the place of beginning or end of one or more of the lot lines is not sufficient to control the presumption that the grant extends to the centre of the highway; as, for the same reason, similar language with reference to monuments standing at or near the bank of a stream does not prevent the grantee from holding *ad medium filum aquæ*. *Low v. Tibbets*, 72 Me. 90, 94.

Gump v. Sibley, supra, is so distinct an authority on this point that it would seem unnecessary to refer to the previous cases; but the principle of interpretation laid down in them all would carry a grant such as we have here to the centre of the street. *Peabody Heights Co. v. Sadtler*, 63 Md. 536; *Gould v. B. & O. R. R. Co.*, 67 Md. 64; *Hunt v. Brown*, 75 Md. 48.

The best authorities elsewhere support the same rule.

Beveridge v. Ward, 10 C. B. N. S. 400; *Dean v. Lowell*, 135 Mass. 55, 60; *Peck v. Denniston*, 121 Mass. 17; *White v. Godfrey*, 97 Mass. 474; *Newhall v. Iveson*, 8 Cush. 595; *Jackson v. Lowe*, 12 Johns. 252; *Wallace v. Fee*, 50 N. Y. 694; *Banks v. Ogden*, 2 Wall. 57; *Carver v. Paul*, 24 Pa. St. 210; *Moody v. Palmer*, 50 Cal. 31; *Johnson v. Anderson*, 18 Me. 78.

"The rule is now well settled that when a line is given running 'to the road, and thence by the road,' the grant is to the centre of the road." *Oxton v. Grove*, 68 Maine, 372.

In *Dean v. Lowell* (135 Mass. 55), the description was as follows: "Thence northerly by said railroad company's land about 416 $\frac{2}{3}$ feet to the road near the Arch bridge, so called; thence southwesterly by said road about 433 feet to a stone wall; thence southerly by said wall, &c.," and it was held that the deed passed the title to the middle of the road. The rule rests on two principles: First, the maxim that every grant is to be construed most favorably to the grantee; and secondly, the presumption that the grantor who conveys land adjacent to a highway and owns to the centre of it, does not intend to reserve in himself the fee of the strip of ground so occupied for a public use. *Chan. Kent*, 3 Kent Comm. 363; The doctrine of the case of *Sibley v. Hammond*, 10 Pick. 249, the authority followed by Judge Wright, has been repudiated even in Massachusetts. See cases from Massachusetts reports, above cited, and more especially *Dean v. Lowell*; besides being expressly overruled in other jurisdictions.

2. It is clear that the owner of the fee of a street holds it subject *only* to the public easement in the surface and to those rights which are necessarily incident to the use of it as a street. The *sub-stratum* belongs to the fee simple owner, who may himself make any use of it not incompatible with the public use of the surface and ground immediately below the surface for ordinary street purposes, and, if he is intruded upon, he may maintain an action for the wrong done him.

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Argument of Counsel.

3. Neither city ordinance nor Act of Assembly can dispossess the plaintiff of his right of property. *O'Brien v. Balto. Belt R. R. Co.*, 74 Md. 372.

4. Ejectment is the appropriate remedy. *Goodlitle v. Aker*, 1 Burr. 133; *Adams, Eject.* 21; *Bolling v. Mayor, etc.*, 3 Rand. 563; *Wright v. Carter*, 3 Dutcher, 76; *Browne v. Galley, Hill & Denio*, 310; *Goodson v. Richardson*, L. R. 9, Ch. 221.

E. J. D. Cross and Geo. Dobbin Penniman (with whom was *John K. Cowen* on the brief), for the appellees.

The appellee contends that by applying the rules of construction laid down by this Court in previous cases, it will be seen at once that the ruling of the lower Court is correct. Practically similar questions have been before this Court in the following cases: *Peabody Heights Co. v. Sadler*, 63 Md. 533; *Balto. & Ohio R. R. Co. v. Gould*, 67 Md. 60; *Hunt v. Brown*, 75 Md. 481; *Gump v. Sibley*, 79 Md. 1.

Applying these decisions to the deed of Deborah Hoffman, now under discussion, the beginning point is described as "the southeast corner or intersection of Howard and German streets." If in *B. & O. R. R. Co. v. Gould*, a description calling for "the corner" formed by the intersection of Winder and Henry streets, and then a line running northerly on the *west side* of Henry street to another "corner," formed by the intersection of Henry and Wells streets, fixes these corners at the *intersection of the side lines* of the streets "with as much certainty and positiveness as if stones had been called for in the deed," certainly the words "southeast corner, or intersection," fixes the beginning point at the intersection of the south side of German with the east side of Howard. This term "southeast corner" is a common one, and is always used to distinguish such a corner from that formed by the intersection of the *north* and *west* sides of the street, etc. The effort of the counsel for the appellant below to show that this "southeast corner" was situated at the intersection of the *centre* lines of the two streets, is not

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supported by any use of the term which the grantor in the Hoffman deed can be presumed to have had in mind. Starting, therefore, with a fixed beginning point on the *east side* of Howard street, we also have the ending point of the fourth line, which runs along Howard street, fixed on the *east side*.

It would appear from an examination of the descriptions in the *Sadlier*, and *Hunt v. Brown* cases, that this Court has always decided that where one end of a line is fixed on the side of a road, the line will be considered a straight line, and the other end will be considered as fixed *also* on the *side* of the road. The Court will presume, in the absence of anything distinctly to the contrary, that both ends of the lines are either on the centre line, and the connecting line follows that line, or that both ends are on the side and that the connecting line follows the side. In these cases the *beginning* of the line was on the side of the road, and it does not clearly appear where the *end* was, but the end was presumed to be on the side, and the *straight* line which connected them was placed on the side of the road. Running this fourth line backwards, therefore, the end of the third line will be presumed to be on the same side of Howard street as the beginning point, and the line connecting them must run along the east side of the street. This was one of the points decided in *Gould's case*, 67 Md. 60.

FOWLER, J., delivered the opinion of the Court.

This is an action of ejectment. The plaintiff owns a lot on the southeast corner of Howard and German streets, in the city of Baltimore, fronting twenty-five feet on the south side of German street, with an even depth of eighty feet. The defendant was duly authorized by the Legislature and the Mayor, &c., of Baltimore, to construct a tunnel under the bed of Howard street, and as constructed in front of the plaintiff's lot, the tunnel in no way obstructs traffic, its lowest point being sixty and its highest point, or top, fifteen feet below the surface of the street. It also ap-

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pears that at this place the tunnel occupies a strip of land sixteen feet and seven inches wide, east of the centre line of Howard street. The plaintiff claims that under a proper construction of his deed, he owns to the centre line of Howard street, and if he be correct in this contention, he must recover, it being conceded that the tunnel at this point extends more than sixteen feet east of the line which the plaintiffs claim as the western boundary of his lot. And the sole question, therefore, is whether the plaintiff's lot extends to the centre of Howard street or only to the east side thereof, and the solution of this question depends upon the proper construction of one deed, namely, that of Deborah Hoffman to The Corporation for the Relief of Widows, &c., of the Clergy, &c., dated January 24, 1839, and recorded among the Land Records of Baltimore County (now city), in Liber T. K., No. 289, folio 480, &c. The description, which is the only part of the deed we are now concerned with, is as follows: "Beginning * * * at the southeast corner or intersection of Howard and German streets, and running thence easterly, bounding on German street, twenty-five feet; then southerly, parallel with Howard street, eighty feet, to a nine-foot alley; then westerly, bounding on said alley, to Howard street, twenty-five feet; and thence northerly, bounding on Howard street, to the place of beginning."

The plaintiff offered a number of prayers, all based upon his construction of the foregoing description, that his lot extended to the middle of the street, but the learned Judge below instructed the jury that he was not entitled to recover, and the verdict and judgment being against him, he has appealed.

The case was elaborately argued, but in our opinion, the question presented has been settled by decisions of this Court in cases substantially similar to this. In the first place, we will examine the language of the deed. The beginning point of the lot conveyed is *the southeast corner or intersection* of Howard and German streets, and this point of inter-

section must be at the point where the *east side* of Howard street and the *south side* of German street intersect, for these lines, and no other, can form "the southeast corner of Howard and German streets." The beginning point being thus clearly placed on the *east side* of Howard street; the lines of the lot, according to the deed, are as follows: Easterly, bounding on German street; then by two courses to Howard street; and thence, bounding on Howard street, *to the place of beginning*, which place of beginning we have seen is on the east side of said last-named street.

We think it is evident there was no intention manifested by the grantor in the deed under consideration to convey any portion of the bed of Howard street. For it must be conceded that the beginning point is on the *east side* of Howard street, and it is also clear that the end of the fourth and last line of the lot is at the same point. And this being so, it is not reasonable to suppose that it was the intention of the grantor that the third line should run beyond the *east side* of Howard street to the centre line thereof, and thence to the place of beginning. The result of this would be to convey a triangular lot or strip of land in the bed of Howard street, bounding neither on Howard street nor on the centre line thereof—which would certainly not be consistent with the description found in the deed. In the case of *Sibley v. Holden*, 10 Pick. 249, in considering a case very similar to the one now before us, the Supreme Court of Massachusetts uses this language: "The question is whether when the description returns to the road again, it shall be taken to mean the side or the centre of the road. If construed to the centre, then the remaining line would be neither by the side of the road nor the centre, but by a diagonal line from a point in the centre to a point in the side. This would not only be obscure and inconsistent with any supposed intention of the parties, but repugnant to the last clause in the description which is 'by the said road,' to the place of beginning." And continuing, the Court says, "as one point in this line is fixed by the

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description to the side of the road, we are satisfied that by a just and necessary construction the other point must be taken to be at the same side of the road, and therefore the soil of the road is not included."

It is contended that the case just cited has been repudiated, even in Massachusetts, and the case of *Dean v. Lowell*, 135 Mass. 55, was relied on to sustain this position. But in *Dean v. Lowell*, *Sibley and Holden* is not referred to in any way, and while the decision in the latter case is based upon the fact that as one end of the disputed line was indisputably fixed on the side of the road, the other point must be there also, the conditions were entirely different in the former case. In *Dean v. Lowell*, the Court used this language: "The side of the road is not mentioned in the deed;" and again: "Neither the end or any other particular part of the wall is mentioned." It was contended that as the line in dispute ran "by the said road" to a stone fence, the line must run on the side and not in the centre of the road, because it was shown by the evidence that the stone fence terminated at the side of the road. But it was held that as neither the side of the road, nor any particular part of the stone wall was mentioned in the description, the general rule should prevail, and the deed was held to convey to the centre line of the road. But if one end of the disputed line had been fixed on the side of the road, it might have been well inferred in *Dean v. Lowell*, as was done in *Sibley v. Holden*, and the cases in this State, which will be presently noticed, that the bed of the road was not included nor intended to be, and thus, if the descriptions in the two deeds had been similar, the conclusions reached in the two Massachusetts cases above referred to, would have been the same, and, as we think, in accord with our own decisions.

The general doctrine that a call to bound on a public highway without more, will be presumed to be a grant to the centre of it, if the grantor owns the fee of the bed thereof, is well established in this State, but it is also quite

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as familiar to us that this presumption is not conclusive. *Hunt v. Brown*, 75 Md. 483; *Sadtler's case*, 63 Md. 533; *Gould's case*, 67 Md. 60, and *Gump v. Sibley*, decided at January term, 1894.

It would unnecessarily prolong this opinion to examine in detail the cases just cited in order to show that by the rules of construction announced in all of them, the description in this case must be held not to include the eastern half of Howard street in front of the appellant's lot. In *Gould's case, supra*, it was said that the points of beginning and ending of lines, those points being designated corners of streets, as in the case before us—"fix the beginning and ending of the lines with as much certainty and positiveness as if stones had been called for in the deed." In the description, we are now considering the point of the beginning and ending is the southeast corner of Howard and German streets. This point, as we have seen, is the beginning of the first and the ending of the fourth line, which latter "bounds on Howard street." In the absence of any clear intimation in the deed to the contrary, we must assume that both ends of the line are either on the centre or side line. Here we have one end of the disputed line on the side line of Howard street, and the other end will, therefore, be on the same side of the street, and the line itself will run thereon. As was said in *Sibley v. Holden, supra*, when "one point in the line is fixed by the description to the side of the road, we are satisfied that by a just and necessary construction, the other point must be taken to be at the same side of the road." In *Sadtler's case*, the parties themselves placed the boundary stones on *the sides* of the road, and the calls were for these boundaries. But whether fixed by the parties themselves or not makes no difference (*Hunt v. Brown*), for the question is in every case what is the true construction of the deed. In *Sadtler's case*, we held, that as the boundary stones were on the side of the road, and the lines ended at them, the lines could not be extended to the middle of the road. It is true we have no stone boun-

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dary in this case, but we have what in *Goula's case* was held to fix the lines with as much certainty, namely, the designated corner of two streets, which is necessarily on the sides of both streets. We cannot agree with the suggestion upon any reasonable construction, that the corner of two streets can be found in the middle thereof, namely, at the point where the centre lines of the two streets intersect.

Where one end of a line is fixed on the side of a highway, no rule of construction known to us will justify the location of the other end of that line in the centre of it. Such a location should be made only when required by express words to that effect.

By the Act of 1892, chapter 684, it is provided, in accordance with our suggestion made in *Hunt v. Brown, supra*, that title passes to the centre of the street or highway in all cases of devise, gift, grant or conveyance of land binding on any street or highway, or when any street or highway shall be one or more of the lines thereof, unless title to such street or highway is reserved *in express terms*. This Act, having been passed subsequent to the date of the deed here in question, is not applicable to this case. Agreeing with the learned Judge below, the judgment will be affirmed.

Judgment affirmed with costs to the appellee.

(Decided March 26th, 1895.)

BRYAN, J., dissented.

MOSES FOX *vs.* LOUIS MERFELD, TRUSTEE, ETC.

Landlord and Tenant—Distraint for Rent Issued after Application in Insolvency.

When, at the time a distraint is issued by a landlord, the tenant had applied for the benefit of the insolvent law, his property cannot be taken under the distress for rent due at the time of the application.

When a debtor applies for the benefit of the insolvent law, his property passes *in custodia legis* for the benefit of all of his creditors.

Appeal from an order of the Court of Common Pleas of Baltimore City, in Insolvency (PHELPS, J.) The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Thos. R. Clindinen, for the appellant.

Martin Lehmayr, for the appellee.

ROBERTS, J., delivered the opinion of the Court.

This appeal is taken from an order of the Court of Common Pleas of Baltimore City, passed in the case of Charles Coblenz, an insolvent. The facts are substantially as follows: On the 22nd day of December, 1893, Charles Coblenz filed his petition in the Court of Common Pleas to obtain the benefit of the insolvent laws of the State of Maryland. On the same day Louis Merfeld was appointed preliminary trustee, to whom the petitioner conveyed all of his property, in trust, for the benefit of his creditors. At the time of filing his said petition, the petitioner was occupying, as tenant of Moses Fox, certain premises on Wilson street, in said city, and was then over four months in arrear for rent due and unpaid. The petitioner, at the time of his assignment,

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was conducting on said premises a livery stable, and engaged in the business of boarding horses, and had in his possession a number of horses and carriages belonging to his customers, as well as certain property belonging to himself. The preliminary trustee, on the day of his appointment, filed his petition in said Court, calling the Court's attention to the facts just stated, and to the further fact that Coblenz was in arrear for unpaid rent, and requested an order of Court authorizing him to return to the respective owners their several horses and carriages and to remove from the demised premises all property belonging to the insolvent; which order the Court passed, authorizing the trustee to deliver the horses and carriages to the owners thereof, and directing the removal of the property of the insolvent estate and hold the same subject to the further order of the Court. On the day following, Moses Fox, the owner of the premises on Wilson street, issued a distressment under which he seized all the property remaining on the premises at the time of levying the distress, which consisted of a horse, buggy and dayton. Fox, on the same day, issued another distress under Art. 53, sec. 18 of Code, for the purpose of reaching the property which had been removed from said premises, and seized certain other property of the insolvent. Subsequently it was agreed between the parties to this controversy that the trustee in insolvency should sell all the property of the insolvent, subject to any lien which the Court might find Fox had acquired by virtue of his two distresses. The property was accordingly sold by the trustee, and the question was then argued and determined by the Court below that Fox had acquired no lien by the levy of the distresses, and that he only stood in the position of a general creditor. The question now to be decided is one free of serious difficulty. In no material respect does it differ from the case of *Buckey v. Snouffer*, 10 Md. 149, which settled the law in this State, and has only recently been approved by this Court in *Gaither v. Stockbridge*, 67 Md. 228. It is the declared doctrine in this State that when a debtor applies

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for the benefit of our insolvent laws, his property passes *in custodia legis* for the benefit of his creditors, and it being well settled that goods *in custodia legis* are not liable to be distrained upon, it follows necessarily that the distresses, or either of them, cannot be sustained, as the property, at the time when the warrants were issued, had passed beyond the reach of any legal right to distrain. It is also clearly settled law in this state, that rent is not *per se* a lien on goods found on the demised premises, unless the same have been seized under a legal distress. In this case the rent had been due since the 15th of December, 1893, but Fox slept upon his rights and allowed Coblenz to apply for the benefit of the insolvent law before he issued his first distress. He was then without a remedy, as the property of the insolvent had passed into the custody of the law, subject only to such liens or incumbrances as had been acquired before Coblenz' application. Of course the second distress, under the provisions of Art. 52, sec. 18 of Code, occupies no better position than the first, and both are without authority of law to sustain them.

It was contended at the hearing in this Court, that *Buckey v. Snouffer, supra*, was decided when the Act of 1805, ch. 110, sec. 7, was in force, and that the then terms of the Act were wholly different to the provisions contained in the Act of 1854, ch. 193, which is now codified as sec. 11 of Art. 47 of Code, and reads as follows : "The estates of the insolvent shall be distributed under the order of the Court according to the *principles of Equity*, and no creditor shall acquire a lien by *fieri facias* or attachment, unless the same be levied before the filing of his petition." It is insisted that this section provides another and entirely different method for the distribution of the estates of insolvents. We have not, however, been referred to any authority sustaining this view, nor are we aware that distribution of estates in the insolvent Courts has at any time, either in England or in this country, been made, save "*according to the principles of equity.*"

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A quarter of a century before the decision of *Buckey v. Snouffer*, it was announced by this Court, after a most careful examination of the English and American cases, that the proper rule for the distribution of the estates of insolvents was "according to the principles of equity." *McCullough v. Dashell's, Admr.*, 1 Harris and Gill, 96. We find no error in the order of the Court below, and therefore affirm it.

Order affirmed with costs.

(Decided March 26th, 1895.)

JULIUS GRABRUES *vs.* JACOB KLEIN ET AL.

Contributory Negligence.

In an action to recover damages for an injury alleged to have been caused by the defendant's negligence, the case should not be withdrawn from the jury on the ground of the plaintiff's contributory negligence, when the evidence shows that the plaintiff was walking alongside of his wagon, on a city car track, when defendant's cart, drawn by a mule, but with no driver in sight, approached on the opposite track, and that the mule, when four or five feet distant, turned suddenly out of the track towards the plaintiff, crushing him between the wheel of the cart and his own wagon, and that plaintiff made every effort to get away when the mule turned out of the track, but was unable to do so.

Appeal from the Court of Common Pleas of Baltimore City. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Hyland P. Stewart, for the appellant.

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Alfred S. Niles and *Oscar Wolff*, for the appellees.

The evidence shows that plaintiff was walking in the street, either alongside the centre of his wagon or alongside the first wheel, driving his team. His team was going at a walk, and was on the south side of Hillen street, taking up only half of the south car track. The defendants' cart was coming down Hillen street without a driver, also at a walk. When plaintiff first saw defendants' team, it was coming down in the north track, about ten or twelve feet away from him, the mule being a little further away than the head of plaintiff's wheel horse. When plaintiff and defendants' team was "a couple of steps together like," "some four or six feet away," the defendants' "cart came directly across the street and turned into plaintiff," bringing the mule's head right up against plaintiff's wagon, cutting him off from getting out in front. Then the mule grazed by the plaintiff, and plaintiff was caught between the hub of defendants' cart and the rubbing block of his own wagon.

It is not easy to perceive how an adult, healthy man, competent to drive a three-horse team, and used to driving horses, could, under any circumstances, without the grossest negligence on his part, have been run down in broad daylight by a mule going at a walk, and drawing a loaded brick cart. . But here the mule came directly towards him, and all he had need to do was to catch his bridle; or hit him with his whip; or take a couple of steps back to a place of safety, perfectly open and unobstructed; or have taken one or two steps to the left. If he had done any of these things, which any ordinarily careful man could not have failed to do, he would never have met with his unfortunate accident.

The whole proximate cause of the accident, was that the plaintiff was walking alongside his wagon, where he could not see what was before him, when he turned a corner, until his team was straightened out, instead of being on his wagon or his wheel horse; because he didn't watch the other teams on the street, and because he did not act like

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an ordinarily prudent man when he found the mule "actually grazing him." We do not see how the Court could have done otherwise than grant defendant's prayer.

BRISCOE, J., delivered the opinion of the Court.

This was an action brought in the Court of Common Pleas of Baltimore to recover damages for personal injuries sustained by the appellant, resulting from the negligence of the appellee's servant in driving a cart along the streets of Baltimore. At the conclusion of the plaintiff's evidence the Court instructed the jury that the negligence of the plaintiff directly contributed to the injury, and their verdict must be for the defendants. And it is from the judgment thus entered on the verdict that this appeal is taken. The only question, then, presented by the exception to the prayer is, whether the case should have been submitted to the jury, or whether the facts were so clear and plain as to have justified the Court in pronouncing them contributory negligence as a matter of law. And, as the prayer is in the nature of a demurrer, it becomes necessary to examine the evidence upon which it was based.

The plaintiff testified that at the time of the accident he was on the east-going car track, on Hillen street, driving three horses attached to a farm wagon loaded with manure, and was walking close by the side of his wagon, and only occupying one-half of the east-going track; that when he first saw the appellee's cart it was about ten or twelve feet from him, coming down the west-bound car track, the cart being loaded with bricks and drawn by a mule, but no driver was in view. He further testified, that when about four or five feet from him, the mule turned directly across the street, catching him between the hub of the wheel of the appellee's cart and the rubbing-block or brake of his own cart, thereby inflicting a serious and permanent injury to his left leg. He also testified, that as soon as he saw the mule and cart coming towards him, he made an effort to avoid the accident; that he was prevented from advancing to the front, and in endeavor-

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ing to escape by trying to step backward was caught and dragged against the brake or rubbing-block of his wagon. In the language of the witness, "When I saw the mule coming towards me I wanted to get out of the way, but the cart was too close before I could run away." "I tried to run out of the way, but before I could do so the wheel caught me." "The mule turned out quickly and cut me off." He further testified that he was careful and tried to save himself, but could not do so. The witness, Burns, who saw the accident, stated that the plaintiff was almost opposite to him "when the cart pulled out of the track and shied on the other side and caught the plaintiff."

Now, it was upon these undisputed facts, at the close of the plaintiff's case, that the Court instructed the jury that the plaintiff was guilty of such contributing negligence as would prevent a recovery on his part, notwithstanding the conceded negligence of the defendants.

Plainly there was error in this instruction as applicable to the facts presented by the record in this case. "Ordinarily," said this Court, in the recent case of *Peoples' Bank v. Morgolofski*, 75 Md. 441, "the question of negligence is one for the jury, but sometimes it becomes the duty of the Court to instruct them, that in spite of the negligence of the defendant the plaintiff cannot recover. The Court, however, will never assume this responsibility, unless the case is a very clear one and presents * * some prominent and decisive act in regard to the effect and character, of which no room is left for ordinary minds to differ." And this has been the uniform current of decisions of the Courts upon this subject. We fail to find any act on the part of the plaintiff here that can be relied on as tending to show such contributing negligence, as warranted the Court in withdrawing this case from the jury. On the contrary, the plaintiff testified that he made every effort to avoid the accident, but could not do it, and this, in connection with the other testimony, was not sought to be denied, but was admitted under the pleadings. We are all, then, of the

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opinion that this case should not have been withdrawn from the jury, and for this error the judgment will be reversed and a new trial awarded.

*Judgment reversed and a new trial
awarded, with costs in this Court
and below.*

Decided March 26th, 1895.)

THE BALTIMORE AND OHIO RAILROAD COMPANY *vs.* RICHARD W. CAIN.

Arrest Without Warrant for Breach of the Peace on Railroad Train.
—*Evidence.—Damages.—Action for False Arrest.—Special Findings of Fact.—When Arrest may be Made Without a Warrant.*

Plaintiff, while a passenger on defendant's train, was intoxicated and guilty of a flagrant and continuous breach of the peace. Upon the arrival of the train at a station, the conductor caused plaintiff to be arrested without a warrant, by a police officer, being the first officer whom the conductor saw, and taken before a magistrate, by whom a fine was imposed. In an action for false imprisonment against the railroad company, *Held*, that under these circumstances the arrest was lawful.

The right to make the arrest depended upon whether the plaintiff was in fact guilty of a breach of the peace, and not upon whether he was so charged by the conductor.

If the plaintiff had in fact not been guilty of a breach of the peace, the defendant would be liable for the act of the conductor in ordering his arrest at the railway station for such alleged cause, because the plaintiff while there was still a passenger and entitled to protection against the illegal acts of defendant's employees.

If a felony or breach of the peace has in fact been committed by the person arrested, the arrest may be justified by any person without warrant. And in the above case, the act of the conductor in telegraphing for a policeman and, within a short space of time thereafter, handing plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor in the midst of

the riot and disorder, and the prompt delivery of him afterwards to an officer.

A person, other than an officer, may take into custody, without warrant, one who in his presence is guilty of an affray or a breach of the peace. And such person may also arrest the affrayer after the actual violence is over, but whilst he shows a disposition to renew it.

Where incompetent evidence to prove a particular fact has been improperly admitted, the judgment will not be reversed if the same fact has been subsequently proved by competent evidence.

In an action to recover damages for false imprisonment, a prayer instructing the jury that if they find for the plaintiff, "they are at liberty to take into consideration all the circumstances attending the alleged arrest, the indignity to the plaintiff, his mental and bodily sufferings incident to the act, and award such damages as they may believe will compensate plaintiff for the wrongful act of the defendant," states correctly the measure of damages.

Where the Court is asked, before the arguments begin, to submit to the jury special interrogatories under the Act of 1894, ch. 185, and the interrogatories submit material questions of fact, the request should be granted.

Appeal from the Circuit Court for Howard County. At the trial below, the evidence produced on the part of the plaintiffs was to the effect that he, together with J. W., Robert and J. W. C. Watkins, boarded defendant's train at Washington Grove camp-meeting to go to Washington; that R. Watkins, who was sitting by plaintiff, had a stump of a cigar in his hand, and, upon being accused by the conductor of smoking, denied that he was smoking, and threw the cigar out of the window; that Watkins and the conductor had a verbal altercation on the subject, and when the conductor threatened to put him off the train, plaintiff told the conductor that he would go too if Watkins was put off for nothing; that when plaintiff stepped from the car in Washington, the conductor pointed out him and one of the Watkins men to a police officer, saying, "These are the men;" that the officer arrested and took them to a police station, where they were detained fifteen or twenty minutes and fined five dollars each. Plaintiff testified that he was not drunk or under the influence of liquor, but that

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he had had two drinks of whiskey before getting on the cars, and took one drink on the train. The three Watkins' also testified that plaintiff was not drunk.

On the part of the defendant, four witnesses testified that plaintiff and his companions were drunk and disorderly at the camp-meeting grounds, before getting on the train. The conductor testified that plaintiff and his three companions entered a ladies' car ; that they were all drunk and disorderly and were using profane language ; that one of them was smoking ; that he saw them drink whiskey twice on the train ; that he endeavored to quiet them, without avail, and requested them to go into the smoking car, which they refused to do ; that complaint of their conduct was made by the passengers, and that he was obliged to direct other ladies who got on the train to go into the forward car ; that he did not undertake to put them off the train, because there were four of them together, and he did not think himself able to do so after plaintiff said that if he undertook to put them off he would have to go too. Passengers on the train gave evidence to the same effect, and the policeman who arrested plaintiff, and the clerk at the station house in Washington testified that plaintiff was under the influence of liquor when brought there. The policeman testified that he made the arrest without warrant, it being the practice in Washington to arrest on complaint and carry the complaining witness to the station house, where he prefers the charge.

The plaintiff offered the following prayers :

Plaintiff's First Prayer.—The plaintiff, by his counsel, prays the Court to instruct the jury, that if the jury shall believe from all the evidence that plaintiff was, on the 21st of August, 1892, a passenger upon defendant's cars from Washington Grove camp, in Montgomery County, Maryland, to Washington City ; that he paid and defendant accepted his fare as such ; that upon plaintiff's arrival in Washington City and immediately upon the plaintiff's leaving the cars of the defendant, and while still in the depot and upon the premises of the defendant, and before he had

opportunity to leave said depot and premises of the defendant in Washington, defendant's conductor, Gaither, in charge of the train upon which plaintiff was, if the jury shall find that Gaither was a conductor of defendant's, caused the arrest of plaintiff in the manner as mentioned in the testimony, at Washington City, in the District of Columbia, and that the plaintiff was at that time conducting himself in a reasonably orderly and peaceable manner; that such arrest was made without a warrant, and plaintiff was taken up to a station house in Washington City, and detained until he deposited five dollars as his security for his appearance on the next morning, and that such arrest was made upon the allegation of drunken and disorderly conduct on the part of plaintiff whilst on the cars of defendant on the occasion mentioned, that then such conduct on part of defendant's agents was wrongful and illegal and defendant is responsible for the same, and the verdict of the jury must be for plaintiff. (Granted.)

Plaintiff's Second Prayer.—The plaintiff, by his counsel, prays the Court to instruct the jury, that if they shall find a verdict for the plaintiff, they are at liberty to take into consideration all the circumstances attending the alleged arrest of the plaintiff, the indignity to plaintiff, his mental and bodily sufferings incident to the act, and award such damages as they may believe will compensate plaintiff for the wrongful act of the defendant. (Granted.)

And the defendant offered the nine following prayers, and also the following special exception to the granting of the plaintiff's first prayer:

Defendant's First Prayer.—The defendant prays the Court to instruct the jury that there has been no evidence offered in this case legally sufficient to show that the acts complained of by the plaintiff were committed by the defendant or its duly authorized agent or agents, or that it has ever ratified said acts, and the verdict of the jury must therefore be for the defendant. (Rejected.)

Defendant's Second Prayer.—The defendant prays the

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Court to instruct the jury that it was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant, and that it was the duty of the conductor to maintain order on the said train, and if the plaintiff was acting in a disorderly manner on said train the conductor could eject him from the train; and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner and was threatened with expulsion from the train by the said conductor, and that on account of the companionship of the plaintiff with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, and that the disorderly conduct of the plaintiff continued up to the time he left the cars in the depot of the defendant at Washington; that then the conductor was justified in pointing out said plaintiff to any police officer who might be present when said plaintiff left the cars and requesting his arrest upon the charge of disorderly conduct, and for this arrest the defendant would not be liable; and if the jury further find, that upon the arrival of the train in the Washington depot, the conductor did point out the plaintiff to a police officer and request his arrest upon the charge of disorderly conduct, the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Third Prayer.—The defendant prays the Court to instruct the jury that if the jury find that the plaintiff, when he arrived in the Washington station, was acting in an intoxicated and disorderly manner, that then the conductor was justified in requesting the police officer, who was present, to arrest him at once, without a warrant, on the charge of disorderly conduct; and for this arrest the defendant is not liable, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Fourth Prayer.—The defendant prays the Court to instruct the jury, that there is no evidence in this

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case legally sufficient to show that the defendant violated any of the plaintiff's rights as a passenger until the conductor directed the arrest of the plaintiff in the Washington depot ; and if the jury find that the plaintiff, at the time he was arrested in the Washington depot, was intoxicated and disorderly, that then his arrest at the direction of the conductor was warranted by the condition and conduct of the plaintiff at that time, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Fifth Prayer.—The defendant prays the Court to instruct the jury, that it was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant, and that it was the duty of the conductor to maintain order on said train, and if the plaintiff was acting in a disorderly manner on said train, the conductor could eject him from said train ; and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner and was threatened with expulsion from said train by the conductor, and that on account of the companionship of the plaintiff, with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, that then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff ; and if the jury further find that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Sixth Prayer.—The defendant prays the Court to instruct the jury, that in considering the question whether or not the plaintiff's rights as a passenger were violated, only the action of the conductor in pointing out the plain-

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tiff in the Washington depot, and requesting his arrest on the charge of disorderly conduct, can be considered, there being no evidence in this case legally sufficient to show that the plaintiff's rights, as a passenger, were violated in any other manner. (Granted.)

Defendant's Seventh Prayer.—The defendant prays the Court to instruct the jury, that if the jury find that the plaintiff, when he was on the train coming from Washington Grove to Washington, and when he arrived in the Washington station, was acting in an intoxicated and disorderly manner, that then the conduct of the plaintiff justified the conductor in requesting the police officer, who was present, to arrest him at once, without a warrant, on the charge of disorderly conduct ; and for this arrest the defendant is not liable, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Eighth Prayer.—The defendant, by its counsel, prays the Court to instruct the jury, that if under the pleading and evidence in this cause, the jury shall believe that the plaintiff was a passenger on one of the trains of cars of the defendant on the morning of August 21st, 1892, and that while on said train plaintiff and his companions were charged by the conductor of said train with being disorderly thereon ; and further, that the conductor threatened to put one of the companions of the plaintiff off said train, whereupon the said plaintiff threatened to put conductor off too ; that the conductor then told plaintiff and his companions that he would have them arrested when the train reached Washington ; that the conductor telegraphed from Forest Glen to Washington, and that upon the arrival of said train at Washington it was met by a policeman ; that as plaintiff and his companions stepped from said train on the platform of the defendant's depot in Washington, conductor said to a policeman (pointing out to him the plaintiff and his companions), " Those are the men that I had reference to," whereupon said policeman arrested the said plaintiff and took him to a station house, that then there is no

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evidence in this case legally sufficient to charge the defendant with said arrest, and the verdict of the jury must be for the defendant, even though the jury shall find that the conductor accompanied the said plaintiff and police officer to the station house in Washington, and there preferred charges against said plaintiff of being drunk and disorderly on his train. (Rejected.)

Defendant's Ninth Prayer.—The defendant, by its counsel, prays the Court to instruct the jury, that if from the pleadings and evidence in the cause they believe that the plaintiff was a passenger on one of the trains of cars of the defendant on the morning of Aug. 21st, 1892, as testified to by the witnesses ; that the said plaintiff was drunk and disorderly while on said trains of cars ; that upon the arrival of said train at Washington, the conductor pointed out the said plaintiff to the officer Howe, and requested him to arrest plaintiff ; that Howe then placed the said plaintiff under arrest, and the said conductor accompanied the officer and said plaintiff to the police station, and there preferred charges against the plaintiff, that then this is not an illegal arrest by the defendant, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's Special Exceptions.—The defendant excepts especially to the granting of the plaintiff's first prayer, because there has been no evidence offered in this case legally sufficient to show that any authorized agent or agents of the defendant caused the said arrest of the plaintiff, or that the defendant ever ratified said arrest. (Rejected.)

The Court below (JONES, J.), granted the plaintiff's prayers, and refused all of the defendant's prayers, except the sixth, which it granted. And to this action of the Court the defendant's third bill of exceptions was taken.

The fourth exception was taken to the refusal of the Court to submit the following special interrogatories to the jury :

1st. Did the defendant ever expressly authorize the conductor to arrest persons who were disorderly on his train?

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2nd. Did the defendant ever ratify the arrest of the plaintiff by the order of the conductor?

3rd. Did the plaintiff continue in an intoxicated condition from the time he boarded the train until he alighted from the train at Washington?

4th. Was the plaintiff drunk and disorderly while a passenger on the train of the defendant?

5th. Was the conductor anxious to eject the plaintiff from the train and was he able to do it?

6th. Was it one of the duties or powers of the conductor to order the arrest of the plaintiff in Washington? (Refused.)

The first exception was taken to the refusal of the Court to exclude the testimony of Watkins, to the effect that he heard the police officer who arrested the plaintiff say that he had no warrant. The second exception was taken to the refusal of the Court, at the close of plaintiff's evidence, to grant two prayers offered by the defendant, the first of which is the same as the defendant's first prayer as above set forth; and the second of which was to the effect that there being no evidence that the plaintiff was illegally arrested without warrant, the verdict must be for the defendant.

The jury returned a verdict for the plaintiff for \$758, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

W. Irvine Cross and Geo. Dobbin Penniman (with whom were John K. Cowen and J. S. Newman on the brief), for the appellant, cited: 3 Black. Com. 128; *Kane v. State*, 70 Md. 551; *Deitrick v. Ry. Co.*, 58 Md. 347; *Vicksburg, etc., Co. v. O'Brien*, 119 U. S. 97; *Carter v. Howe Machine Co.*, 51 Md. 290; *Tolchester Beach Co. v. Steinmeier*, 72 Md. 313; *Nat. Bank v. Baker*, 77 Md. 462; *Central Ry. v. Brewer*, 78 Md. 394; *Allen v. London, &c., Co.*, L. R. 6 Q. B. 65; *Poulton v. London, &c., Co.*, L. R. 2 Q. B. 534;

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Roe v. Ry. Co., 7 Exch. 36; *Ry. Co. v. Brown*, 6 Exch. 314; *Taaffe v. Slevin*, 11 Mo. App. 514.

Alexander Kilgour (with whom was Joseph D. McGuire on the brief), for the appellee, cited: *Ry. Co. v. Buck*, 116 Ind. 566; *Toledo, &c., Co. v. Goddard*, 25 Ind. 191; *Greenleaf on Evi.*, sec. 108; *Phillips on Evi.*, 231; *Lung v. Tyngborough*, 9 Cush. 37; *Day v. Gorsuch*, 4 Md. 267; *Ry. Co. v. Boucher*, 27 Md. 277; *Weed v. Panama, &c., Co.* 17 N. Y. 362; *Cooley on Torts*, 175; *B. & O. Co. v. State*, 60 Md. 449; *Grendard v. Ry.* 36 Wis. 657; *Goddard v. Grand Trunk Ry.*, 57 Me. 202; *Stewart v. Brooklyn, &c., Co.*, 90 N. Y. 588; *Mulligan v. N. Y., etc., Co.* 129 N. Y. 506.

McSHERRY, J., delivered the opinion of the Court.

This is an action of trespass for false imprisonment. The declaration alleges in substance that the plaintiff was a passenger upon one of the cars of the defendant; that he was received as such passenger at Washington Grove station for the purpose of being carried from that place to Washington City, and that it thereupon became the duty of the defendant to carry the plaintiff safely to his destination; yet the defendant did not carry the plaintiff safely to Washington, but instead thereof, when the car conveying the plaintiff reached the depot of the defendant in said city, the defendant, by its agents and servants, assaulted and beat the plaintiff, and forced him to go from said car and depot into the public street, and gave him into the custody of a police officer, who took him to a police station, and caused the plaintiff to be there imprisoned, without any probable cause, for the space of two hours; whereby he was greatly bruised, hurt and injured. The defendant pleaded not guilty. During the progress of the trial, which resulted in a verdict and judgment for the plaintiff, four exceptions were reserved and the defendant then took the pending appeal.

There is, as might be expected, and as is usual in cases of this character, some diametrically conflicting testimony respecting a portion of the material facts; but only so much

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of this as is necessary to clearly present the legal principles involved need be alluded to or stated.

It is not disputed by either side, that early on Sunday morning, August the twenty-first, 1892, the plaintiff and three companions drove to a camp-meeting held at Washington Grove, in Montgomery County, and that shortly after reaching the ground they, together with several others, went to the railroad station nearby, and the four, namely, the plaintiff and three others by the name of Watkins, took passage on the cars of the defendant for the city of Washington, in the District of Columbia. They entered the ladies' car, and from this point the conflicting statements of the witnesses begin. According to the plaintiff's evidence, these four parties demeaned themselves in the car with perfect propriety until the conductor charged one of them, Robert Watkins, with smoking. Watkins denied the accusation and some words followed, whereupon the conductor threatened to put Watkins off the train. The plaintiff then told the conductor that he, the conductor, would go off too if he put Watkins off for nothing. After further words the conductor said he would have the party arrested when they got to Washington, and just as the plaintiff stepped off the train in the depot at Washington he was arrested by a police officer, to whom the conductor, then standing by and pointing to the plaintiff and the elder Watkins, said, "These are the men." They were taken to the police station, and after having given their watches and effects as bail, and after having been in custody fifteen or twenty minutes, they were released. The conductor appeared against them at the station house. The plaintiff himself testified that "the police fined them five dollars apiece, and he left his watch as security, and afterwards produced the money and got the watch." Upon the part of the defendant, it was proved by a number of witnesses, some of whom were passengers on the same train of cars, that the conduct of the plaintiff and his three companions was most disgraceful, shocking and disorderly, from the time they reached the camp-meeting

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ground until they arrived in Washington. They were drunk before boarding the train, and as stated by one of the witnesses, "it was not decent for them to be where there were ladies;" and when they were remonstrated with and requested to desist from using profane language in the presence of ladies, they, all, including the plaintiff, in loud and boisterous tones, replied by saying, "God damn the ladies." The defendant further proved, that after these men entered the ladies car they cursed and swore and drank liquor openly, and that one of them was smoking ; that the conductor expostulated with them and urged them to be quiet, or to go into the smoking car where they could drink and smoke as much as they pleased ; that they said they had paid their fares and would ride where it suited them. The conductor again appealed to them to be orderly or he would be obliged to put them off the car ; whereupon the plaintiff replied, "if you put him off (meaning Watkins, who was smoking), you will have to go too." It was further proved, that numerous complaints were made by ladies and gentlemen about the conduct of these four men, and that one lady left the car and went into the forward car. Afterwards other ladies who got on the train at other stations were put in the forward car, because it was not fit for them to enter the one where these men were. The conductor did not undertake to put them off, because he did not believe himself able to cope with these four intoxicated and lawless men. Just before the train arrived in Washington the plaintiff was still behaving in a disorderly manner and using profane language in the hearing of the passengers on the same car. There were between fifty and sixty passengers on the train, most of whom were on their way to church in Washington. Finding himself unable to control these men or to suppress their disorder, and feeling powerless to eject them because of their threatened resistance, the conductor telegraphed from Forest Grove to Washington for an officer to arrest them, and when the train drew up in the depot in that city the policeman was there, and the con-

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ductor pointed out to him the plaintiff, and the officer then and there arrested the plaintiff and took him to the station house.

With these facts before the jury, there were two prayers presented by the plaintiff, both of which were granted; and there were nine presented by the defendant, all of which, except the sixth, were rejected. The view we take of the case dispenses with a separate consideration of each of these prayers, inasmuch as the defendant's fifth prayer raises the crucial inquiry contained in the record; and what we shall say in discussing that prayer will, with a few brief additional observations, dispose of most, if not all, of the others. The fifth prayer maintains that if the plaintiff was riotous and disorderly the conductor had the right to eject him; that if the conductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and it proceeds, "if the jury further find, that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant." From this prayer, considered in connection with the evidence to which allusion has been made, it is obvious at a glance that the predominant and controlling question before us involves the legality of the conceded arrest made in the city of Washington. Under the undisputed proof that arrest was made without a warrant having been first procured.

[It was not made for an alleged felony, nor for a misdemeanor or breach of the peace committed within view of the officer who took the plaintiff into custody; but, if the evidence of the defendant's witnesses be credited, it was made for a flagrant breach of the peace, which began at Washington Grove and continued into Washington City, on

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the moving train of the defendant, and was made at the instance of the conductor the very moment he reached a place where he could deliver these intoxicated offenders into the custody of a police officer. Was the arrest so made illegal?

It is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law. *Roddy v. Finnegan*, 43 Md. 504; *Phillips v. Trull*, 11 Johns. 486; *Derecourt v. Corbishly*, 5 El. & Bl. 188; and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause. *Rex v. Birnie*, 1 Moody & R. 160; *Rohan v. Sawin*, 5 Cush. 281. And so any person, though not an officer, in whose view a felony is committed, may arrest the offender. *Ruloff v. People*, 45 N. Y. 213. But the right of a person not an officer to make an arrest is not confined to cases of felony, for he may take into custody, without a warrant, one who in his presence is guilty of an affray or a breach of the peace. *Knot v. Gay*, 1 Root, 66. "It seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace." 1 Rus. on Crimes, 272; 1 Arch. Crim. Prac. & Pl., 82; 1 Haw. P. C., ch. 63, sec 11 and 17; 2 Hale P. C., 90; East P. C., 306; *Timothy v. Simpson*, 1 C. M. & R. 757. The case last cited was one of trespass for assault and false imprisonment and taking the plaintiff to a police station. Plea, that the defendant was possessed of a dwelling house and the plaintiff entered the same and then and there insulted, abused and ill-treated the defendant and his servants, and greatly disturbed them in the peaceable enjoyment thereof in breach of the peace, whereupon the defendant requested the plaintiff to cease his disturbance and to depart from and out of the house, which the plaintiff refused to do; that thereupon the defendant, in order to

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preserve the peace and restore good order in the house, gave charge of the plaintiff to a policeman, and requested the policeman to take the plaintiff into his custody to be dealt with according to law, and the policeman gently laid his hands on the plaintiff and took him into custody. It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article, when a dispute arose between the plaintiff and the defendant's shopman; that plaintiff refused on request to go out of the shop; the shopman endeavored to turn him out and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house. PARKE, B., in course of his lucid opinion, said, "It is unquestionably true that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers and detain them until the heat be over, and then deliver them to a constable." Then, after quoting from *Haw. P. C.*, the same passage we have transcribed from *1 Rus. on Crimes*, the learned Baron went on, "and pleas founded upon this rule and signed by MR. JUSTICE BULLER are to be found in 9 *Went. Plead.* 344, 345, and DEGREY, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him

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whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue ; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender ; and, of course, the person so complaining is justified in giving the charge to the constable. *Lord Hale, P. C.*, 89. * * * * * It is clear upon the facts that there was a defence on the ground of the defendant's right to arrest for a breach of the peace in his presence." See also *Grant v. Moser*, 5 M. & Gr. 127; *Simmons v. Milligan*, 2 C. B. 524; *Webster v. Watts*, 11 Q. B. 311 (63 E. C. L. R.); *Cohen v. Huskision*, 2 M. & W. 477; *Shaw v. Chairitie*, 3 C. & K. 21; *Burns v. Erben*, 40 N. Y. 466; *Smith v. Donnelly*, 66 Ill. 464; *Tiedeman on Lim. Police Power*, 84; *State v. Sims*, 16 S. C. 486—a case strikingly apposite. In *Burns v. Erban*, *supra*, it was held that "as a general principle no person can be arrested or taken into custody without a warrant. But if a felony or a breach of the peace has in fact been committed by the person arrested, the arrest may be justified, by any person, without warrant, whether there was time to procure a warrant or not ; but if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless, such offence has, in fact, been committed, and there was reasonable ground to suspect the person arrested. *Hales, P. C.* 72 ; *I Chitty, Cr. L.* 15 ; *Hally v. Mix*, 3 Wend. 353."

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him by the witnesses, he was incontestably engaged in a flagrant and an outrageous breach of the peace, as pronounced as if there had been an actual affray during the whole time he was in the defendant's car ; and it was clearly lawful, under these conditions, for the conductor to expel him and his drunken companions from the train if he had a sufficient

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force to overcome their threatened resistance, or else to arrest them all without warrant and then deliver them to the first peace officer he could procure within a reasonable time. If this were not so, then, as said by LORD C. J. DENMAN in *Webster v. Watts, supra*, "the peace of all the world would be in jeopardy." And it would be in jeopardy, because if in such and similar instances no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained. *Mitchell v. Lemmon*, 34 Md. 181. And there would soon cease to be any order or any security or protection afforded the public on swiftly moving railroad trains, or even elsewhere, unless a peace officer were constantly present. The delay necessarily incident to obtaining a warrant would be in many, if not in most cases of this and a kindred character, equivalent to an absolute immunity from arrest and punishment; and should the name of the offender be unknown, he most probably would never be apprehended if once suffered to depart. The law is not so impotent and ineffective as that. Being physically unable to expel these alleged riotous persons from the train, the conductor telegraphed for a peace officer, and without delay, and whilst the plaintiff was still drunk, caused his arrest the instant the officer thus summoned came in view of the plaintiff. If, then, any bystander could, in the language of BARON PARKE, "for the sake of the preservation of the peace * * * * * restrain the liberty of him whom he sees breaking" the peace, the act of the conductor in telegraphing for the policeman and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor, in the midst of the riot and disorder, and the prompt delivery of him afterwards to the officer. If the plaintiff was not in fact arrested by the conductor because of the presence of superior resisting force, that fact cannot make the subsequent act of the conductor in pointing out the plaintiff to the officer, wrongful or illegal. The charge, accord-

ing to the plaintiff's own testimony, was sustained ; a fine was imposed and he paid it. The accusation was therefore well-founded, and what was done by the conductor, if the facts testified to by the defendant's witnesses be credited, was undeniably lawful under all the circumstances. If this be so, then there is obviously no cause of action against the defendant, because no wrong has been done to the plaintiff. This is the theory of the defendant's fifth prayer. That prayer being correct in principle and proper in form ought to have been granted. For the same reasons the second, third, fourth and seventh prayers should have been granted. The eighth was properly rejected. It makes the right to arrest depend on the fact that whilst on the train the plaintiff was charged by the conductor with being disorderly, whereas the right to arrest depended on the fact that the plaintiff was in reality disorderly. His having been charged by the conductor with being disorderly, is quite a different thing from his having been in fact disorderly. The ninth prayer was properly rejected. It failed to submit to the jury that the arrest was made for the alleged breach of the peace. Though the arrest had been made without an assigned cause, the prayer exonerated the defendant. The plaintiff's first prayer ought to have been rejected. Its fallacy lies in the postulate that an arrest for a breach of the peace, committed out of the view of a peace officer, necessarily could not be legally made without a warrant. The second prayer of the plaintiff related to the measure of damages and was correct.

The ruling in the first exception is affirmed. Though the evidence objected to had been inadmissible, the same fact was subsequently proved in an unobjectionable way by officer Howe. Consequently no injury was done, and without injury there can be no reversible error.

At the conclusion of the plaintiff's case, the defendant offered two prayers, asking the Court below to withdraw the case from the jury. They were rejected, and this ruling is the one complained of in the second exception. We find

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no error in this. If the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful, and having been made in the defendant's depot whilst the plaintiff, a passenger, was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employes, if wrongfully made by or at the request of the defendant's own servants whilst they were in and about the performance of their prescribed duties, the master would be liable. There was some evidence before the jury that the arrest had been made without a warrant, and therefore the second prayer was properly rejected. One of these prayers was again presented at the close of the case and was again rejected, and we think properly rejected.

The remaining exception relates to the refusal of the Court below to submit special interrogatories to the jury under the Act of 1894, ch. 185. We have had occasion to consider that Act during the present term of this Court, and need not refer again to its provisions. The interrogatories propounded by the defendant were presented before the arguments to the jury began, and therefore at a seasonable time; and the third, fourth and fifth, submitting material questions of fact, which the defendant under the statute had the right to require the jury to pass on and respond to, should have gone to the jury for specific answers. There was error in refusing this request. The other questions submitted were immaterial.

For the error, then, in rejecting the defendant's second, third, fourth, fifth and seventh prayers, and in granting the plaintiff's first instruction, and for the error in refusing to submit the third, fourth and fifth special interrogatories to the jury, the judgment must be reversed and a new trial will be awarded.

*Judgment reversed with costs above
and below, and new trial awarded.*

(Decided March 26th, 1895.)

THE MAYOR AND CITY COUNCIL OF BALTIMORE AND OTHERS *vs.* THE KEELEY INSTITUTE.

Medical Treatment of Habitual Drunkards at Public Expense.—Constitutional Law.—Power of Legislature over Municipalities.—Title of Statutes.—Mandamus to Compel Payment by a Municipality.

The Legislature has the power to require municipal corporations to pay for the medical treatment of habitual drunkards residing within the municipality, who may be committed by the Courts to a medical institution for such treatment, and who are themselves unable to pay for the same.

The Act of 1894, ch. 247, provides that where a petition to a Circuit Court sets forth that a certain person is an habitual drunkard, a resident of the county or city, that neither the petitioner nor such person is able to defray the expense of medical treatment for drunkenness, and where such person agrees in writing to take such treatment, then the Court shall send such habitual drunkard to some institution for the cure of drunkenness, and order that the expense thereof, not exceeding \$100, be paid by the county or city where the drunkard resides. Under this Act the Circuit Court of Baltimore City committed a certain person to the Keeley Institute, and ordered that the sum of \$100 for the expense of his treatment be paid out of the treasury of the city. The proceedings in the Circuit Court were *ex parte*, without notice to the municipal authorities, and upon their refusal to pay said sum, a petition was filed by said Institute praying for a writ of *mandamus* commanding such payment to be made. Upon appeal from an order directing the *mandamus* to issue as prayed, *Held*,

1st. That the Act in question is valid under the Constitution of Maryland; the expense of the treatment of pauper drunkards being an expenditure for a public purpose, and the Legislature having the power to compel municipal corporations to perform any act within the ordinary functions of municipal government.

2nd. That although no provision is made for notice to the city of the proceeding, or an opportunity afforded to contest the allegations of the petition, yet the Act is not in violation of the Constitution of the United States, as depriving the city of its property without due process of law.

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3rd. That the writ of *mandamus* was the appropriate remedy in this case.

The title of the above-mentioned Act was "An Act to provide for the treatment and cure of habitual drunkards." In the body of the Act provision is made for treatment only. *Held*, that the Act is not in violation of Art. 3, sec. 29 of the Constitution, which provides that every law enacted by the General Assembly shall embrace but one subject, and that shall be described in the title.

Appeal from a *pro forma* order of the Superior Court of Baltimore City, directing a writ of *mandamus* to issue commanding the appellants to pay to the appellee the sum of one hundred dollars, which sum a decree of the Circuit Court had directed should be paid for the treatment of an habitual drunkard committed to the custody of the appellee under the Act of 1894, ch. 247. This Act is summarized in the opinion of the Court.

On June 11, 1894, the petition of Mrs. Annie Moylan, a sister of the habitual drunkard, in compliance with the terms of the Act of 1894, chapter 247, was filed in the Circuit Court of Baltimore City, and on same day the Court passed a decree directing that the habitual drunkard be sent to the appellee to be treated for drunkenness, at the expense of the city of Baltimore. The language of the decree providing for the payment of the expense of said treatment is as follows: "That the expense of such treatment (to-wit, the sum of one hundred dollars, in full), be paid out of the treasury of the city of Baltimore, in the same manner that other claims against such city of Baltimore, for the administration of justice, are paid." The decree also recited that the facts necessary to be found, as provided under the terms of the Act in question, had been found by the Court. The Court's language, in the decree, is as follows: "And the Court, being satisfied from examination of said petition and annexed agreement, affidavit and names, and from oral examination, in open Court, under oath, of the said John P. Moran and Annie Moylan, and other examination, that the facts set forth in the said petition are true, and that the said drunkard, John P. Moran, has been

a resident of Baltimore City for six months next preceding the application aforesaid, and that such drunkard, John P. Moran, of his own free will, desires to take such treatment." On June 12, 1894, two persons, described as the local and general managers for Maryland, of the appellee, took a form of an oath of office, in which the office, with which they are to be entrusted, is described as "the office of bailiff for habitual drunkards." On the 27th June, 1894, a "final decree" was passed by same Court, in which many of the statements and recitals of the decree of the 11th June, 1894, are repeated, especially the clause above cited, providing for the payment by the appellant of the one hundred dollars, the language being exactly the same as in the original decree. This *final decree* recites that the treatment has been given and discharges the habitual drunkard from the custody of the appellee. The whole proceedings were *ex parte*, and the first notice or knowledge the appellants had of any of said proceedings in the Circuit Court was the demand made on James R. Horner, City Comptroller, one of the appellants, for the payment of the one hundred dollars named in decree. The Comptroller declined to pay the amount.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, J. J.

Thomas G. Hayes, City Counsellor, for the appellants.

The Act of 1894, ch. 247, is void, because the Legislature has no power to compel the city of Baltimore, without its consent, to tax its citizens for the support of habitual drunkards at inebriate asylums. There are certain public duties which distinctly appertain to municipalities as governmental agencies, over the performance of which the State has direct and complete control entirely independent of the wish or will of the municipality, and over which the State may at any time assume direct control, such as the public highways within the territorial limits of the municipal cor-

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poration. This power of the State over highways, within the limits of municipalities, has never been denied or seriously questioned. But the power of the State over municipalities is not absolute or unlimited. There are many things which the State cannot compel a municipal corporation to do without its consent. The test is, does the thing required by the State to be done by the municipal corporation, without its consent, "*fall within the ordinary functions of municipal government?*" If it does not, then, without the consent of the municipality, the State cannot compel it to act, let the mandate of the State be ever so peremptory. *M. & C. C. of Balto. v. State*, 15 Md. 469; *Pumphrey's case*, 47 Md. 145; *Talbot Co. v. Queen Anne's Co.*, 50 Md. 258; *M. & C. C. of Balto. v. Reitz*, 50 Md. 580.

The appellant contends that the Legislature has no more power to compel the city of Baltimore to tax its citizens to pay for the treatment of an habitual drunkard, under the terms of the Act of 1894, than it has to pay for the treatment of pneumonia, typhoid fever or any other of the numerous diseases which the flesh is heir to. An habitual drunkard *per se* is not a subject of governmental concern, much less of municipal treatment by a municipality, with limited powers defined by statute. It is, therefore, respectfully submitted, that the Act makes a contract for the city of Baltimore, without its consent, in a matter of local concern, and not within the ordinary functions of municipal corporations, and especially not within the scope of the powers or duties as expressed in its charter, and hence exceeds the power of the Legislature, and is void. *People v. Detroit*, 28 Mich. 228; *People v. Chicago*, 51 Ill. 1; *People v. Batchelor*, 53 N. Y. 128; *Atkins v. Randolph*, 31 Vt. 226; *Cooley on Taxation*, 693, 701; *Cooley on Const. Lim.*, 284; *Lowell v. Boston*, 111 Mass. 473; *Hasbronck v. Milwaukee*, 13 Wis. 37; *Hampshire v. Franklin*, 16 Mass. 84; *State v. Tappan*, 29 Wis. 680. "A city is made up of individuals owning the property within its limits, the lots and blocks which compose it and the structures which

adorn them. What would be the universal judgment should the Legislature, *sua sponte*, project magnificent and costly structures within one of our cities—triumphal arches, splendid columns and perpetual fountains, and require, in the Act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost and impose such costs as a lien upon his property forever? What would be the public judgment of such an Act, and where would it differ from the Act under consideration?" *People v. Chicago*, 51 Ill. 31.

There is a marked distinction between the governmental functions of a municipality and its acts and liabilities as a private corporation. When it acts within the domain of a private corporation the same rules of law as to the power of the Legislature over it applies as to private individuals, whether natural or artificial. This distinction is recognized in a number of cases. *Mayor and C. C. Balto. v. Marriott*, 9 Md. 160; *Mayor and C. C. Balto. v. Brannan*, 14 Md. 227; *Moodday v. The East Ind. Co.*, 1 Br. Ch. R. 469; *Bailey v. N. Y.*, 3 Hill, 536; *Masterlin v. Brooklyn*, 7 Hill, 61; *West. Society v. Philadelphia*, 31 Pa. 175.

Under Constitution, Art. 15, sec. 6, the city had the right to have a jury pass upon the facts necessary under the Act to be averred and proven before it could be held liable for one hundred dollars, and as the Act deprived it of this constitutional right, it is in violation of the State Constitution and void. Could the Legislature deprive a citizen of his jury trial and give equity jurisdiction in *assumpsit, debt, ejectment or trespass?* The appellant contends it could not, because it would violate a fundamental maxim of the State and Federal organic law, to-wit, the decision of all issues of fact in common law actions shall be by a jury and not by a judge. *Bardwell v. Anderson*, 44 Minn. 97.

The Act in question has for its title, "An Act to provide for the treatment and *cure* of habitual drunkards." The title is deceptive and misleading. "Treatment and cure," in the title, is proclaimed as the object of the law. The body

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of the law provides solely for treatment, with no word in the body of the statute making a cure a part of the obligation undertaken by the asylum. Bills before the General Assembly are often only read by title. One hearing the title of this bill read had the right to infer that it proposed to provide for the "*cure*," as well as "*treatment*," of habitual drunkards. Approval and support of members of the General Assembly, as well as the public, might be had for a bill which provided a "*cure*" of this terrible appetite ; while lacking faith in any of the many proposed "*treatments*," they might disapprove and oppose a law proposing only treatment.

The Act of 1894, chapter 247, is unconstitutional and void, being in conflict with the provisions of the Constitution of the United States. If the duty imposed on the city of Baltimore, without its consent, by the Act of 1894, chapter 247, is a lawful exercise of the power of the Legislature ; yet, as the Act in question makes a judicial procedure necessary, in which facts were to be ascertained by evidence given in Court, before the liability of the city attached, and it was required to tax its citizens to pay for the treatment of habitual drunkards ; then, inasmuch as the Act in question provided only for an *ex parte* judicial procedure, without any notice to the city or opportunity on the part of the city to be heard before the final judgment, decree or order, the Act is void, being in violation of Article 14, section 1 of the Constitution of the United States, which declares, " nor shall any State deprive any person of life, liberty or property without due process of law."

One of the leading tests, as to whether an inquiry or proceeding is judicial in its character, is whether the decision of the issue presented is to be decided by the Court upon *evidence*. The Supreme Court of Indiana, in drawing the distinction between judicial proceeding and administrative, ministerial or discretionary proceeding, said : " The power to hear and determine, when there is a question admitting of controversy, and the entire matter is not one of *absolute*

and *arbitrary discretion*, implies that in reason and justice the law should, by making provision for notice, give the parties an opportunity to be heard, for otherwise, it cannot justly be said that there is due process of law. * * * Where the matter to be decided is one of pure discretion, and the tribunal decides upon its own judgment, *unaided by evidence*, then notice is not essential." *Kuntz v. Sumpton*, 117 Ind. 1, 2 L. R. A. 655; see also *Wiener v. Bunbury*, 30 Mich. 215a.

Every requirement, except one, of a valid judicial proceeding, is provided for in the Act of 1894, chapter 247, Judge or Court, regular allegation by petition, trial by the Court and a provision for judgment or decree. The one essential element, which is wanting, is proper parties. *Muny v. Hoboken*, 18 How. 272; *Huber v. Riley*, 53 Pa. 112; *Rees v. Watertown*, 19 Wall. 122; *Westervelt v. Gregg*, 12 N. Y. 202. It is confidently claimed by the appellants that the Legislature has attempted by the Act in question to provide a judicial proceeding before the liability of the city attached.

The omission from the Act of 1894, chapter 247, of notice to the city and an opportunity to be heard before final judgment, deprived the city of its property without due process of law. *Pennoyer v. Neff*, 95 U. S. 714; *Shore v. Manitowoc*, 57 Wis. 5; *Philadelphia v. Miller*, 49 Pa. 448; *Harwood v. North Brookfield*, 130 Mass. 561; *Lehman v. Robinson*, 59 Ala. 244; *State v. Lindell Hotel*, 9 Mo. App. 455; *Garvin v. Daussman*, 114 Ind. 429.

Frederick W. Story and P. F. Pampel, for the appellee.

ROBERTS, J., delivered the opinion of the Court.

The appeal in this case is taken from a *pro forma* order of the Superior Court of Baltimore City, on a case stated for the opinion and order of that Court, in a proceeding instituted by the appellee to obtain the writ of *mandamus* to compel the appellant to pay to the appellee, under a

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decree of the Circuit Court of Baltimore City, the sum of one hundred dollars for the treatment of John P. Moran, an habitual drunkard, residing in said city. The sole object of this appeal being to obtain from this Court a determination of the validity *vel non* of the Act of the General Assembly of Maryland, chapter 247, passed January session 1894, entitled "An Act to provide for the treatment and cure of habitual drunkards." The Act by its first section provides that any inhabitant of this State, who is of kin to or a friend of an habitual drunkard, as defined in the fifth section of the Act, may apply by petition to the Circuit Court of the County, or the Circuit Court of Baltimore City, where such drunkard resides, for leave to send such drunkard, at the expense of the county or city, as the case may be, to an institution located in Maryland for the medical treatment of drunkenness, as said Court may designate. The first section further provides, that the petition shall be verified by the applicant and contain the name, age and condition of the habitual drunkard, and show that neither he nor his petitioning kin is financially able to incur the expense of his cure; and further, that said petition shall contain the written agreement of said drunkard to take such treatment and obey the rules of the institution to which he may be sent. The second section provides that the Court shall be satisfied of the truth of the facts stated in the petition before sending the drunkard to an institution, and that the charge for the treatment shall in no case exceed the sum of one hundred dollars; and it then further provides, that the Court shall thereupon order the expense of such treatment be paid out of the treasury of the county or the city of Baltimore, as the case may be, in the same manner as other claims for the administration of justice are paid. The third section has no direct bearing on this subject in controversy here. The fourth section provides that the officers of the institution to which a drunkard is sent shall become sworn officers, without compensation, of the Court sending the drunkard for treatment. The fifth section defines

a drunkard to be "any person who has acquired the habit of using spirituous, malt or fermented liquors, cocaine, or other narcotics to such a degree as to deprive him or her of reasonable self-control." This statement gives substantially all the material facts necessary for the purposes of this controversy.

It is contended that the Act is in conflict with the Constitution of this State, for that the Legislature has no power to compel the city of Baltimore, without its consent, to tax its citizens for the treatment of habitual drunkards at an inebriate asylum.

By the provisions of Art. 16, sec. 47 of Code, whenever by petition under oath any person shall be alleged to be a drunkard, incapable of taking care of himself or herself, or his or her property, any Circuit Court of this State, and also the Circuit Court of Baltimore City, shall have the power, in its discretion, on such preliminary examination or inquiry as it may think proper to make *ex parte*, to issue a warrant to the sheriff of the county or city to arrest and bring the person so charged before such Court. Then follows the summons of a jury in a like manner with the established practice in cases of lunatic paupers, under Art. 59 of Code. Under either Article of the Code the proceeding is *ex parte* and the questions to be passed upon are submitted to the finding of a jury instead of the Court. These two provisions of the Code have been in force in this State for many years, and have been, especially with respect to lunatic paupers, of well-recognized service.

The law now under consideration, in so far as it relates to the *liberty* of the drunkard, does not require the intervention of a jury, for the reason that he voluntarily, and in advance, agrees in writing that the Court may send him to any institution in the State for the medical treatment of drunkenness. We are very clear that the law does not in the remotest possible sense curtail any right of the drunkard. Do the provisions of the law requiring the city to pay for the medical treatment of the drunkard improperly or injuriously

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affect any right of the city of Baltimore any more than the tax which is imposed for the maintenance of Courts, civil and criminal, is found to be, as all other taxes are, an exaction for the benefit of the public good. We fail to recognize the force of this objection, especially in its application to the lunatic paupers of the State. The principle invoked has just the same force in its application to the condition of an habitual drunkard as to a lunatic pauper. The law is general in its application and is intended alike for city and county.

The ninth section of Article eleven of the Constitution declares that it "shall not be so construed or taken as to make the political corporation of Baltimore independent of or free from the control which the General Assembly of Maryland has over all such corporations in the State." This Court, in the *Regent's case*, 9 G. & J., 397, says: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the Legislature and its members, officers of the government for the administration or discharge of public duties, as in cases of cities, towns, &c.;" And again in the same case, p. 401, it says: "Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control and direct the corporation, its funds and franchises." Whilst it is not claimed that the Legislature has absolute and unlimited control over the appellant, there can be no doubt as to the power of the Legislature to require the payment by the city of a sum requisite to defray the expense of maintenance and medical treatment of habitual drunkards residing within the corporate limits and committed under the provisions of the law now under consideration. If the Legislature has authority, which we do not question, to treat habitual drunkards as a class of citizens who are entitled to be restrained or medically cared for by placing them in institutions for treatment, it

would naturally follow that, in so far as the law applies to the citizens of Baltimore, the expense of the treatment of its habitual drunkards ought reasonably be borne by it. It was held, as already stated in the *Regent's case, supra*, that the government "has the sole right, as trustee of the public interest, to inspect, regulate, control and direct the corporation, its funds and franchises." It is one of the gravest conditions of the century in which we live, and of which legislators have been compelled to make observation, that the victims of the excessive use of alcoholic stimulants, narcotics, &c., have grown to be legion, not of healthy, robust manhood, but of broken, debauched and decrepit men, against whom and for whom, as a class, public sentiment has a right to appeal to the Legislature for protection. LORD BACON has said, "That all the crimes on earth do not destroy so many of the human race, nor alienate so much property as drunkenness." MR. JUSTICE HARLAN, delivering the opinion of Court in *Mugler v. Kansas*, 123 U. S. 623, says: "There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen, of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the use of intoxicating drinks, nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are in some degree, at least, traceable to this evil."

Mr. Tiedeman, in his work on the *Limitations of Police Power*, sec. 46, says: "It is the policy of some States, notably New York, to establish asylums for the inebriates, where habitual drunkards are received and subjected to a course of medical treatment, which is calculated to effect a cure of the disease of drinking, as it is claimed to be. A large part of human suffering is the almost direct result of drunkenness, and it is certainly to the interest of society to reduce this evil as much as possible. The establishment

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and maintenance of inebriate asylums can therefore be lawfully undertaken by the State."

We think the Legislature was possessed of ample power to deal with the subject-matter of the law, and that in what they did they in no respect violated any provision of the Constitution of the State or of the United States.

There is nothing in the contention that the title to the Act violates Art. 3, sec. 29 of the Constitution, which provides that every law enacted by the General Assembly shall embrace but one subject, which shall be described in its title. The title provides for the "*treatment*" and cure of habitual drunkards, and it is claimed that this contains more than one subject, and that in the provisions of the Act nothing is said about "cure," but reference alone is made to the "*treatment*" of habitual drunkards. But we think the Legislature must have been influenced by the conviction that the *cure* would in some instances, at least, follow the "*treatment*," and that cure and treatment constitute but one subject. We entertain the same view.

In respect to the writ of *mandamus*, we think it properly issued as the remedy appropriate under the circumstances. *It follows that the order must be affirmed.*

Order affirmed with costs.

(Decided March 27th, 1895.)

CATHERINE SCANLON AND OTHERS *vs.* JOHN J.
WALSHE AND OTHERS.

Presumption as to Legitimacy of Children Born in Wedlock.—Proof of Illegitimacy.—Estoppel of Parent.—Legitimation by Subsequent Marriage.—Exceptions to Evidence in Equity.

A child born in lawful wedlock, when non-access of the husband is not established, is presumed to be legitimate, and neither the evidence of the mother nor of an adulterer is admissible to prove that the child is not the offspring of the husband.

In a bill for a divorce from her husband, S., the plaintiff, alleged that certain children were the issue of the marriage, and the decree awarded their custody to her. Subsequently, in a petition for a change of name, the plaintiff averred that after being divorced she had married W., and asked that the names of the children "born to her and her said husband," S., might be changed to W., which was accordingly ordered. Some years afterwards, upon the death of W. intestate, plaintiff claimed that these children were not the offspring of her former husband, S., but of W.; that after her marriage with W., he acknowledged them to be his children, and that consequently, under Code, Art. 46, sec. 29, such marriage and acknowledgement made them the legitimate children of W. At the time the children were born, it was not shown conclusively that S. had no access to plaintiff. *Held,*

- 1st. That the evidence of the plaintiff and the declarations of W. were not competent to show that the children were not the legitimate children of S., and also that the evidence generally was not strong enough to overcome the presumption expressed in the maxim, *pater est quem nuptiae demonstrant.*
- 2nd. That the marriage of the plaintiff and W., and the latter's acknowledgment of the children, were not, under these circumstances, evidence of their illegitimacy.
- 3rd. That in cases under the above statute, the fact of illegitimacy must be first proved, and then marriage and acknowledgment may be offered to show paternity.
- 4th. That the plaintiff was estopped, by her allegations in the bill for a divorce and in the petition for a change of the names of the children, from contradicting her statements then made, that these were the children of S., and the estoppel also applies to W., since he was the instigator of both proceedings and in a position to know the facts.

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Statement of the Case.

In filing exceptions to testimony in equity cases, it is not necessary to set forth all the reasons and grounds on which the exceptions are based.

Appeal from a *pro forma* order of the Circuit Court of Baltimore City, overruling the exceptions of the appellants to an Auditor's Account distributing the sum of \$25,781 to John Joseph Walshe, Augustina Cecilia Walshe and Maria Concezione deGiorgio, who claim as the children and heirs at law of David J. Walshe, deceased. The question on this appeal was whether the said distributees were the children of Walshe.

On November 6, 1875, Carlotta Walshe, then Carlotta Simmonds, filed a bill in the Circuit Court of Baltimore City, for the purpose of obtaining a divorce *a vinculo* from her husband, Florian V. Simmonds, and the exclusive care, custody and control of their six children, whose names and ages are stated as follows: Edward E. Simmonds, aged fifteen years; Attela E. Simmonds, aged thirteen years and eight months; Maria Carlotta Simmonds, aged eleven years; John Joseph Simmonds, aged nine years; Maria Conceptione Simmonds, aged seven years; and Maria Augustina Simmonds, aged five years. Mrs. Simmonds alleged in her bill that she and Florian V. Simmonds were married in the year 1858, since which time, until two years prior to filing her bill, they had lived together as husband and wife; that about two years before filing her bill, she became aware that her husband had committed adultery with various women at various times and places, and that since said acts of adultery came to her knowledge she ceased to live with him or to have any communication with him, and that her own conduct had always been proper and without reproach. She then alleged that by the said marriage she had six children, who are the six children above named. To this bill an answer was filed by the husband, in which he denied the acts of adultery alleged by her, and charged that since the month of March, 1868, she had committed repeated acts of adultery with an admitted paramour, and that while he ad-

mitted the birth of children as alleged, yet he could not admit that they were all the fruits of said marriage.

On November 26, 1876, a decree was passed divorcing the plaintiff *a vinculo* from Simmonds and awarding to her the custody of the children. On August 2, 1877, Carlotta Simmonds was married to David J. Walshe. On July 31, 1883, she filed a petition in the Circuit Court of Baltimore City, reciting her divorce and subsequent marriage, and that the custody of the children born to her and her said husband, Simmonds, had been awarded to her, and praying that the names of John Joseph, Augustina Cecilia and Concezione Maria, might be changed from Simmonds to Walshe. This petition was sworn to by the petitioner, and an order was passed making the change prayed for.

David J. Walshe died on May 26, 1891, leaving a last will and testament, dated the 21st day of May, 1878. There is a codicil bearing date the 5th day of November, 1883. In item 1, after devising and bequeathing a life-estate in one-third of all his property to his wife, he devised and bequeathed the same after her death "to be equally divided between *her* three children, John Joseph, Maria Concepcion and Augustina Cecilia." In item 2 he provided that in the event of the dissolution of the firm of D. J. Walshe & Co., one-third of his interest therein shall go to his wife, and "the remainder to *her* three children," naming them; and in the event of the death of his wife before such dissolution, *her* three children to take the whole interest. In item 3 the sum of thirty thousand dollars is left to the executors in trust to invest ten thousand dollars for each of the children aforementioned, to-wit, John Joseph, Maria Concepcion and Augusta Cecilia. In item 5 he bequeaths his pictures, paintings and books to the daughter of my said wife, Maria Concepcion.

This will was not operative as to real estate owned by Walshe at the time of his death, and the bill in this case was filed by his widow for a sale of the same, distribution of the proceeds, &c. The appellees, in order to establish

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that they were the children of David J. Walshe, produced in evidence several letters from him to them, in which he wrote to them as his children; testimony of various persons as to his frequent acknowledgement of them as his children; his having them to live with him, educating them, introducing and entering them at the schools in which they were educated in Italy as his children, and always treating them as such, together with newspaper clippings showing that at the marriage of Maria Concezione he gave her away as his daughter and presented her with a dowry of \$10,000; also, the testimony of Carlotta Walshe, their mother, who testified positively that they were David J. Walshe's children. All of this testimony was excepted to by the appellants. The appellants, to sustain the issues on their part, introduced in evidence the papers in the divorce proceedings in the Circuit Court of Baltimore City, in the case of *Carlotta Simmonds v. Florian V. Simmonds*, and also the *ex parte* proceedings in the same Court by Carlotta Walshe, for the change of the names of the appellees.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

Richard S. Culbreth and *Richard Bernard* for the appellants.

The decree of the Circuit Court of Baltimore City divorcing Carlotta Simmonds from Florian V. Simmonds, and awarding the custody of their children to her, is of a conclusive nature, and the parties whom it affects are not permitted to contradict it. *Duchess of Kingston's case*, Smith's Leading Cas., 9th ed., 2010, note.

The facts established by the decree are: 1. That the marriage of the parties was a legal marriage. 2. That the husband, as alleged in the bill, committed adultery. 3. That the wife did not commit adultery, but that, as alleged in the bill, her conduct had always been proper and without reproach. 4. That the children named in the bill are the legitimate children of the plaintiff and defendant, of whom

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the plaintiff was awarded the custody. The position in which the parties and their children are placed by the decree, is what is called their *status*. The decree was passed on the 22d of November, 1876. It has stood without attack for collusion or fraud for nearly twenty years. Under the circumstances, therefore, it is a decree *in rem*, the essence of which is that binding one it binds everybody, so that no one, parties or strangers, can controvert it. *Smith's Leading Cases*, 9th ed., pp. 2028, 2046, 2051, 2084; 2 *Bishop on Marriage, Divorce and Separation*, section 1580; *Freeman on Judgments*, sections 159, 313, 586; 1 *Greenleaf on Evidence*, sections 544, 525, 545; 2 *Black on Judgments*, section 803; 1 *Herman on Estoppel*, section 296; *Coke*, 1 Inst. 352b; *Hood v. Hood*, 110 Mass. 465, citing *Burlen v. Shannon*, 3 Gray, 387, and *Smith v. Smith*, 13 Gray, 209.

The children are bound by the decree, even though the effect of it be to bastardize them; and this is true of a child *in utero* at the time the decree of divorce is passed. 2 *Bishop on Marriage, Divorce and Separation*, section 1584; *Perry v. Meddowcraft*, 10 Beav. 122; *Harrison v. Southampton*, 17 Eng. L. and Eq. 364; *Harrison v. Southampton*, 21 Eng. L. and Eq. 343.

By the authorities cited, the children are bound by the decree in the sense that it is conclusive of their legitimacy or illegitimacy, whichever status it may declare. Children, after the nullity decree, are conclusively illegitimate, equally whether the marriage was voidable or void. *Bishop on M. D. & S.*, sec. 1602. *A fortiori* are they conclusively legitimate when so declared, every intendment of law and fact being made in favor of that status. *Gaines v. Hennen*, 24 Howard, 609.

An important fact to be noted in this connection is that two months after the order of the Circuit Court changing the names of the children was passed, Mr. Walshe added a codicil to his will, which is entirely consistent with the averment in the petition that the children, whose names

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were changed, were the children of Mrs. Walshe by Florian V. Simmonds, her former husband, the will, to which the codicil was added, describing the children as *her* children, and one of them as *her* daughter.

Mr. and Mrs. Walshe knew at the time the bill for divorce and the petition for the change of names were filed, all that could ever be known in regard to the paternity of the children. In both papers, she, with his knowledge and he actively participating in the act, declared them to be her children by Florian V. Simmonds, and she alleged that her life had always been proper and without reproach—a fact which, if true, excluded the possibility that they were her children by any one else. And the Court, by its decree, so found. Then they will not be permitted, she by her testimony, or he by his declarations and letters, to deny the facts so alleged and proved, for to do so would be to impute to them a fraud upon the administration of justice. *P. W. & B. R. R. Co. v. Howard*, 13 Howard, 307. "A man shall not be allowed," says the Court of Exchequer, in *Cave v. Mills*, 7 H. & N. 927, "to blow hot and cold, to claim at one time and deny at another." *Edes v. Garey & Lanahan*, 46 Md. 41; *Hall v. McCann*, 51 Md. 351; *Chacquote v. Ortel*, 60 Cal. 601.

If the decree of divorce be conclusive of the status of John Joseph, Maria Concezione and Augustina Cecilia, as the children of Carlotta Walshe by Florian V. Simmonds, her former husband, so that they cannot question or controvert it, all the testimony in the record tending to show that they are the children of David J. Walshe, is, of course, inadmissible. The appellants therefore except to the testimony of Mrs. Simmonds, because: 1. She is estopped by decree of divorce from averring against it, whether it be a decree *in rem* or *in personam*; and 2. Her testimony is against decency, morality and public policy; and 3. Her testimony is of no value in consequence of the conflicting statements made by her, and of the fact that the essential parts of it are contradicted by reliable witnesses.

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Henry C. Kennard, for the appellees.

Whether the appellees were in fact the children of David J. Walshe, and whether they were so acknowledged by him after his subsequent marriage to their mother, together with the further question whether section 29, Article 46 of the Code (2d vol., page 813), applies to cases of illegitimate children born of a married woman during coverture, constitute the questions to be decided on this appeal.

One of the exceptions of the appellant is based upon the inadmissibility of Mrs. Walshe's testimony to prove non-access. The rule as to proof of non-access was adopted mainly for the benefit of the children. The language of the old authorities was that it was not admissible to *bastardize*, and so they laid down the rule that birth during wedlock was a *conclusive* presumption of legitimacy. They ignored the fact that one result of the rule would probably be to establish a falsehood, and impose upon the husband the support of a child not his. As the illegitimate child of a married woman is as much a bastard as if it was born of a single woman. *Rex v. Luffe*, 8 East. 203; *Gera v. Clancar*, 57 L. T. (N. S.) 822.

In the *Banbury Peerage case* (1 Sim. & Stu. 153), a number of questions were submitted to the Judges, and answered in a manner totally at variance with the strictness and harshness of the earlier decisions. Later, still more liberal rules were adopted, and in the celebrated and much litigated case of *Morris v. Davis*, 5 Clark & Fin., 214-15-18, 241 to 244, the present doctrine is thus stated: "In the absence of *all* evidence, either on the one side or the other, the law would presume that such sexual intercourse did take place," *i. e.*, between husband and wife, if there was proof of opportunity of access. In speaking of the *Banbury Peerage case*, it says: "All that is said by the Master of the Rolls, is that the Court, which is to be satisfied that sexual intercourse did not take place, must be so satisfied not upon *a mere balance of probabilities*." See also 2 *Kent's Com.* 211; *Schouler's Domestic Relations*, sec. 225; *Goss v. Froman*, 89 Ky. 318;

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Cannon v. Cannon, 7 Humph. 411; *Herring v. Goodman*, 43 Miss. 396; *Bosville v. Atty.-General*, L. R. 12, P. D. 177-183; *Wright v. Hicks*, 12 Ga. 159; *Barnum v. Barnum*, 42 Md. 300-304; *Shuler v. Bull*, 15 S. C. 421; *Wilson v. Babb*, 18 S. C. 68.

And in this connection it is clear that whatever view this Court may take as to the admissibility or non-admissibility of the testimony of Mrs. Walshe, for the purposes for which it was introduced, there is no rule or authority which will exclude the testimony of Mr. Walshe, unless, indeed, the Court should hold that estoppel applies. In this view, it becomes immaterial whether Mrs. Walshe's testimony is excluded or not. So far as she is concerned, it is simply a question as to whether she is a competent witness to *prove* a fact; but, if this Court is satisfied from other competent proof that the fact exists, nothing more is required. It is to be proved so as to satisfy the Court of its *truth*, like any other fact, by competent testimony. *Wilson v. Babb*, 18 S. C. 68 to 72; *Morris v. Davis*, 5 Clark & F. 241, &c.

Mr. Walshe's acknowledgements and acts are not only competent, but conclusive, since they are not and cannot be denied. Outside of estoppel, this is undisputed testimony as to the fact of the paternity of the appellees, and of a kind as conclusive as is capable of production in proof of such a question. Is there any other possible theory than that they are, in fact, his children, which can account for the difference of treatment shown them and the three older children? If the rule of exclusion applies at all, it can only apply to Mr. and Mrs. Simmonds, and not to Mr. Walshe; and upon the undisputed testimony of the last alone, it is impossible that there can be any real doubt in the mind of anyone as to whose children the appellees are.

It is "certainly competent" for Mrs. Walshe "to prove the fact of her connection with" David J. Walshe during her marriage with Simmonds—to charge him "as the real father of the child." This, too, if she were the only witness, for her right to testify as to this adulterous intercourse

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is put expressly upon the ground of *necessity*, because it is probable that she and the adulterer are the only persons who know anything about it. While in *Rex v. Kea*, 11 East. 132, it is stated that there were probably more witnesses than the wife in *Rex v. Luffe*, 8 East. 202, to prove non-access, and that she alone was not competent—the rest of that decision is approved. Her testimony is also clearly admissible to prove the legitimacy of the appellees. *Rex v. Bramley*, 6 T. R. 331.

As to the objection to all the testimony of appellees on the ground that, by the decree in the divorce case of *Carlotta Simmonds*, and the *ex parte* proceedings to change the names of the appellees, they are estopped from denying that they are the children of *Florian V. Simmonds*, and, as a consequence, from setting up that they are the children of *David J. Walshe*, the appellees contend that the records in those cases are inadmissible as against them, as being *res inter alios acta*. That neither they nor *David J. Walshe* were parties to those proceedings, and the only question involved in them was whether *Mrs. Simmonds* was entitled to a divorce. That the property of *Mr. Walshe* was in no way involved in them, nor were they, in any way, affected by the question of whether there were or were not children. The bill for divorce, not being sworn to, was, at most, the mere statement of the solicitor. *Mobberly v. Mobberly*, 60 Md. 379. The sole question involved in this case is as to the right of the appellees to the property of *D. J. Walshe*, a question in no way involved in the divorce proceeding, which not only was not essential to the adjudication in those proceedings, but could not be so adjudicated. The parties are different and the subject-matter is different, and those two facts alone would seem to be conclusive of the point. If the appellees are correct in this the testimony as to *Mr. Walshe's acknowledgements* is in without exception and without denial or attempted denial of their truth.

The remaining question is whether, admitting the admissibility of the testimony adduced—which is undisputed on

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all material points—do the provisions of the statute (2 Code, Article 46, section 29, page 813), apply to a case like this. Do its terms embrace bastard children born during their mother's coverture. There is certainly no restriction in the statute. Its language applies to all women, *married or single*. It is as broad and all-embracing as it was possible to make it. “If *any* man shall have a child by *any* woman.” There is no canon of construction that can interpret “*any*” to mean *single*. If such had been the legislative intent, it would have in terms confined its application to “*any single woman*.” The language used is equally general in its application to women as to men, and is too plain to leave any room for interpretation; and the appellees claim that even if it was *res nova*, there could not be any doubt as to its application. This precise question, was, however, decided so far back as 1864, by JUDGE WILLIAM ALEXANDER, sitting in the Circuit Court of Baltimore City, in the case of *Hyde v. Rundles*, to be found in the notes to *Alexander's British Statutes*, pages 32-3.

FOWLER, J., delivered the opinion of the Court.

It is fortunate that Courts of Justice are seldom called upon to consider a case in which the facts are so shocking to every sense of decency and morality as those presented by the record now before us. We shall not attempt, in this opinion, to discuss with any particularity the testimony which, we think, justifies this remark, for the view which has been forced upon us, after careful consideration, renders such an uninviting task altogether unnecessary.

On the 26th March, 1891, David J. Walshe, of Baltimore City, died, leaving a will disposing of his personal property and one-third of his real estate and intestate as to the balance of his real estate, which latter consisted of, by far, the larger and more valuable part of the property known as the Mansion House, on the northwest corner of Fayette and St. Paul streets, in said city. A bill was filed in the Circuit Court of Baltimore City by Carlotta

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Walshe, for the sale of said real estate, against a number of persons claiming to be heirs at law of her husband, David J. Walshe, three of them being her own children, born while she was living in lawful wedlock with a former husband, and the others being sisters and the children of a deceased sister of said Walshe. Proper proceedings were had, and, by agreement of parties, the whole property was sold for the sum of seventy thousand dollars, which sale was duly confirmed. By a *pro forma* order, the Court below ratified Auditor's Account B, by which the sum of \$25,795.41 was allowed to three children of the plaintiff as their share of the proceeds of sale. From this order the sisters and the children of a deceased sister of Walshe have appealed. And the question is, who are the heirs at law of David J. Walshe?

There are two sets of claimants, first, two sisters and several nephews and nieces, and secondly, the plaintiff's three children, the youngest of whom is about twenty-four years of age, who, although born while their mother was married to and living in lawful wedlock with her first husband, Florian V. Simmons, from whom she was divorced, claim to be the children of said Walshe, whom she afterwards married, and his heirs at law, because subsequent to their birth their mother and their alleged father married, and he acknowledged them to be his children.

A contention, whose foundations are so contrary to good morals, public policy and the presumption of law, can be maintained only by some *statute* which not only introduces "a new law of inheritance," as our own statute does (*Brewer v. Blougher*, 14 Pet. 178, opinion by CH. J. TANEY), but which, to bring this case within its terms, must also abrogate some rules of evidence which we are not inclined either to weaken or destroy. The statute upon which the appellees, the children of Carlotta Walshe rely to maintain their contention, is section 29, Article 46 of the Code, which provides that "if any man shall have a child or children by any woman, whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in

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virtue of such marriage and acknowledgement, be hereby legitimated and capable in law to inherit and transmit inheritance as if born in wedlock. This section was before this Court for construction in the case of *Hawbecker v. Hawbecker*, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case, that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the Legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment * * * was to remove the taint and disabilities of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of guilt on the part of their parents." And in concluding the opinion, the language of CHIEF JUSTICE TANEY in the case of *Brewer v. Blougher*, *supra*, to the same effect in relation to the same provision of law, is quoted approvingly. We said, "the Legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where "any man shall have a child or children by any woman whom he shall afterwards marry." *Hawbecker v. Hawbecker*, *supra*.

It will be observed, however, that in the case we have last cited, there was no question whatever made as to the paternity or illegitimacy of the children who were admitted to have been born out of wedlock. It was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to

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the admitted facts. But here we have a different condition. Indeed this is the very opposite to *Hawbecker's case*. For while the force of the broad terms of the law is here admitted, it is contended that the foundation facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because, first, the witnesses are incompetent, and secondly, even if competent, their evidence is not of that *strong, distinct, satisfactory* and *conclusive* character which is required to overcome the presumption expressed in the common law rule "*Hæres legitimus est quem nuptiæ*," or another expression of the same rule, "*Pater est quem nuptiæ demonstrant*." The old rule in England was, and also in this country, 1 *Greenleaf on Evidence*, sec. 28, that this presumption of legitimacy was conclusive, but it is said the Courts did not long permit so violent an estoppel. 1 *Bishop on Marriage, Divorce and Separation*, sec. 1170. This legal presumption has been characterized as the foundation of every man's birth and status and of the whole fabric of human society, and no where has its full force and extent been so fully acknowledged and so well expressed, as in the case of *Hargrave v. Hargrave*, 9 Beav. 553, by LORD LANGDALE, the then Master of the Rolls, decided in 1846. He says, "A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances, which only create doubt and suspicion; but it may be wholly removed by *proper* and *sufficient* evidence showing that the husband was, 1. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten, or 4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his Lordship, "puts an end to the question and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual inter-

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course between the husband and wife, and there was no proof of his impotency, *no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child.* It was said in *Crawford v. Blackburn*, 17 Md. 56, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards. And LORD MANSFIELD said in *Goodright v. Moss*, 2 Cowp. 594: "It is a rule founded in decency, morality and policy that the father and mother shall not be permitted to say, after marriage, * * * that their offspring is spurious." And, in our opinion, the testimony of the adulterer, when offered for the same purpose, should likewise be excluded, especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as LORD LANGDALE said in *Hargrave v. Hargrave*, *supra*, there being no proof of impotency, *no evidence* will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgement should not, under the facts of this case, be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgement may be offered to prove paternity. And so it was held in *Grant v. Mitchell*, 83 Me. 27. And in *Hemenway v. Towner*, 1 Allen, 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases last cited were decided upon statutes not altogether like ours, but the questions decided were questions of evidence, and we think what was said in those cases on this subject are particularly applicable to this case. Now, the only testimony before us which can be properly resorted to to prove illegitimacy is that of the plaintiff, Car-

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lotta Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband. *1 Bishop M. D. and Separation*, sec. 1179. And so also as to the declarations and letters of David Walshe, which appear to have been offered to prove acknowledgement of the children. Neither will be admissible to show the husband is not the father, if he had or could have had access as indicated in *Hargrave v. Hargrave, supra*, and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child.

But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show bastardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and inconsistent with the proceedings for divorce and for change of name of her three younger children. She will not be allowed now to come into Court and recklessly contradict what she alleged in the one and swore to in the other. *Edes v. Garey, &c.*, 46 Md. 41; *Hall v. McCann*, 51 Md. 351; *P. W. & B. R. R. Co. v. Howard*, 13 Howard, 335. And it appearing that he was the instigator of both proceedings and in a position to know the truth, the estoppel should work equally against him, his declarations and his letters.

In the supplemental brief on the part of the alleged children of Walshe filed a few days ago, it is suggested that the objections now relied on in this Court to most of the testimony are not covered by the exceptions filed by the appellants below, and David J. Walshe is spoken of as a witness whose testimony was objected to below only on the ground of estoppel. It will, however, be observed that *he* is not a witness. His declarations, verbal and written, were offered, and the testimony of all the witnesses who testified to the former, as well as the latter, which were offered in evidence, all of which was offered to show recognition of the children, was excepted to on the ground of estoppel. And while it

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may be that the estoppel of the divorce and other proceedings may not go to the extent urged by the appellants, yet, as we have already said, both David J. Walshe, if living would be, and Carlotta Walshe is thereby estopped to take positions inconsistent therewith. And we think the exceptions, on the ground of estoppel, filed below, fairly cover the *additional grounds* of estoppel urged in this Court. For while it is required that every exception, in order to be availed of in this Court, must be reduced to writing and filed in the Court below, at least, before the hearing there begins, yet it is not necessary to set forth all the reasons and grounds on which such exceptions are based. But we think it unnecessary to prolong this discussion. It is conceded the exceptions filed below cover the testimony of Carlotta Walshe as to non-access, and having sustained the exception based on this objection, her testimony as to any collateral fact, for the purpose of proving non-access, would also be inadmissible. *Weightman on Marriage and Legitimacy*, 144.

And it must be remembered that we have been considering what is the true rule by which to measure the amount and character of evidence required to prove the child of a married woman to be a bastard, which child is born while the mother is living in lawful wedlock with her husband. And although in this particular case the woman herself, and her children, the youngest of whom is twenty-four years old, are trying to establish the illegitimacy of the children, and for that purpose are asking us to destroy or weaken this rule, which the experience of many years and the wisdom of eminent Judges have sanctioned, we must remember, that such a position is seldom occupied by either the mother or her offspring. She and they are more frequently interested in guarding and enforcing the rule which protects the rights of legitimate rather than the rights of illegitimate children.

We feel bound to say, however, that if all the testimony we have thus excluded were properly before us, we could

not, while giving full force and effect to the legal presumption of legitimacy, and in the absence of that *strong, distinct, satisfactory* and *conclusive* testimony required to overcome that presumption, do otherwise than reverse the *pro forma* order appealed from.

*Order reversed and cause remanded,
costs to be paid out of the fund in
hand of the trustees..*

(Decided March 27th, 1895.)

SAMANNA CROCKETT AND OTHERS *vs.* HARRY B. DAVIS, EXECUTOR, AND OTHERS.

Wills—Testamentary Capacity—Evidence of Medical Men—Reasons for Opinions—Undue Influence—Sufficiency of Evidence.

An attending physician is competent to testify as to the mental capacity of a testator, without first stating the facts and circumstances upon which his opinion is based.

The opinion of a medical expert on that subject is not only some evidence, but is generally very important evidence to go to the jury, particularly if he was well acquainted with the testator and attended him professionally.

But if a medical expert gives the reasons upon which his opinion is founded, and they are such as men of ordinary knowledge can weigh, and are, in the judgment of the Court, clear absurdities from which no rational inference can be deduced, then his opinion that the testator did not have mental capacity is not legally sufficient evidence to prove the same.

When the question was as to testamentary capacity *vel non*, a physician who was the son-in-law of the testatrix, and who had attended her professionally for a number of years, including the time when the will was made, testified that in his opinion she was not then of sound and disposing mind, capable of executing a valid deed or contract; that a caveat to her late husband's will, filed shortly before she executed her own, had greatly excited her; that she was in bad health, forgetful, self-contradictory and could easily be persuaded to

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do absurd things; that she suffered from chronic gastritis, which had weakened her mind, and that he could not remember all she said which produced that impression on him. Other witnesses testified that the testatrix was melancholy, weak, nervous and excitable. *Held*, that the reasons given by the physician for his opinion were not so inconclusive as to justify the Court in withdrawing the question of testamentary capacity from the consideration of the jury.

If the facts proved are such that a rational mind might in reason and fairness draw from them the conclusion sought to be established, it is the duty of the Court to submit the case to the jury.

Upon the trial of a caveat to a will, where one of the issues involved the question of undue influence, the evidence showed that the testatrix, who had children by two husbands, bequeathed the greater part of her property to her children by her second husband; that most of the property had been acquired by her own industry; that her relations with the children so excluded were of an affectionate character; that she lived eighteen months after making the will and never spoke of it to the caveators. There was no evidence that any of the legatees under the will knew that it had been made. *Held*, that these facts did not constitute any legally sufficient evidence of undue influence.

Appeal from the Superior Court of Baltimore City. The case is stated in the opinion of the Court. At the close of the evidence adduced on behalf of the caveators, the defendants offered the following prayers:

1 and 2. If the jury shall find from the evidence that Catherine Davis signed the will offered in evidence in the presence of the witnesses, Marcus Ritgert and John Shick, as testified to by them; and that said persons, at her request, in her presence and in the presence of each other, signed their names as witnesses to said will, then the verdict of the jury must be for the defendants on the first and seconds issues.

3. The defendants pray the Court to instruct the jury that no sufficient evidence has been offered to show that the will offered in evidence was procured by *undue influence*, and therefore the verdict of the jury must be for the defendants on the third issue.

4. The defendants pray the Court to instruct the jury that no sufficient evidence has been offered to show that

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Catherine Davis, at the time she executed the will offered in evidence, was not of sound and disposing mind and capable of executing a valid deed and contract ; and, therefore, the verdict of the jury must be for the defendants on the fourth issue.

The Court below (RITCHIE, J.) granted all of said prayers, and the verdict on the issues being for the defendants, the plaintiffs appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, JJ.

S. S. Field and John F. Gontrum (with whom was Samuel Regester on the brief), for the appellants.

If there was any evidence from which a rational mind might have found undue influence or incapacity, then the Court erred in withdrawing those issues from the jury. No matter how slight the Court may have considered the evidence, if there was any evidence *legally tending* to prove these issues, they should have been submitted to the jury. *Mayor & C. C. v. Williams*, 6 Md. 236, 267-8; *Morrison v. Whiteside*, 17 Md. 452; *Moore v. McDonald*, 68 Md. 340; *Weik v. Hiss*, 78 Md. 439; *C. & C. Co. v. Scally*, 27 Md. 589; *Clarke v. Dederick*, 31 Md. 148; *Green v. Ford*, 35 Md. 82.

As to capacity. Testator "must have capacity to comprehend the extent of his property and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property." 1 *Redfield on Wills*, 4th ed. page 129. "It is not sufficient of itself that a testator should be able to describe his feelings or give correct answers to ordinary questions." *Davis v. Calvert*, 5 G. & J. 279. "It is not sufficient, *per se*, that he should be able to describe his feelings or to give suitable answers to ordinary questions. This he may do, and yet his mind may be too much diseased to enable him to dispose of his estate with understanding and discretion." From JUDGE WASHINGTON, charge to the jury in *Harrison v. Rowan*, 3 Wash. C. C.

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586. "It is a great but not an uncommon error to suppose that because a person can understand a question put to him and can give a rational answer to such question, he is of perfect sound mind and is capable of making a will. * * In *Combe's case* the rule is laid down in these words: 'It was agreed by the Judges that same memory for the making of a will is not at all times when the party can answer to anything with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void.' * * * So again, in the *Marquess of Winchester's case*: 'By the law it is not sufficient that the testator be of memory when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason.'" SIR JOHN NICHOLL in *Marsh v. Tyrrell*, 2 Hagg. Ec. R. 84.

Several witnesses, including the attending physician, gave their opinions as to Mrs. Davis' mental condition at the date of the alleged will. Every witness who thus testified had known Mrs. Davis long and intimately, and saw her frequently during time about which they speak. The doctor married one of her daughters in 1863, and from 1868 to her death, in 1892, he lived near her and was her regular physician. No objection was made to the admission of these opinions in evidence, but upon the prayers, the Court swept them all aside, as well as the other evidence, and withdrew the case from the jury. In our judgment, this was a most remarkable invasion of the province of the jury. Laying out for a moment all the other evidence, we believe that the annals of judicial history, from the earliest times to the present, will not furnish another case where a Judge has instructed the jury that there was no evidence of incapacity, in the teeth of the direct, emphatic, uncontradicted, unimpeached testimony of the attending physician.

The rule requiring ordinary witnesses to state such facts as they can as the ground of their opinions "does not require them to describe what is not susceptible of descrip-

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tion, nor to narrate facts enough to enable a jury to form an opinion from those alone. This would be impossible, and if it could be done, there would be no occasion for any opinion of the witness." *Beaubien v. Cicotte*, 12 Mich. 503; 2 *Redfield, Am. Cas., Wills*, 85.

Facts and circumstances must be stated to show that witness had sufficient opportunities of observing the party, to enable him to form a correct opinion of such party's mental condition, otherwise his opinion, if objected to, will not be admitted. "If the opportunity of forming a judgment has not been good, the opinion will be of little or no value." *Kerby v. Kerby*, 57 Md. 360.

But there is no precise rule as to just what opportunities of judging will qualify an ordinary witness to state his opinion. In *Waters v. Waters*, 35 Md., one "brief and casual conversation" on the only occasion witness ever met the party, was held not sufficient. On the other hand, in the leading case on this subject, a witness who had visited deceased once, and taken her directions for her will, was permitted to testify, *without giving* any special grounds for his opinion: "That he was impressed with the belief that as to her mental faculties, Mary Clary was in a state called childish." *Clary v. Clary*, 2 Iredell, 78. JUDGE GASTON's opinion in this case has been quoted and approved all over this country: *e. g.* in 7 Gill, 28; 111 U. S. 617; 6 Ga. 335; 16 Ala. 779; 12 Mich. 503; 76 Mo. 315.

In *Kerby v. Kerby*, 57 Md. 360, one witness, Mr. Clark, who had visited deceased, "he says a dozen times a year," was held, thereby qualified to give his opinion. See also *Norris v. State*, 16 Ala. 779, where opinions of a father and school teacher were ruled admissible, on the ground of their opportunities of judging. These authorities have been referred to as illustrating the rule upon the admissibility of such evidence, but are not important in this case, because the opinions given in this case were all admitted without objection, and thereby on this appeal, the *admissibility*

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thereof is *concluded*. Cases *supra*, 7 G. & J. 80, and 11 Md. 101.

It does not necessarily follow that the opinion of a witness should be excluded, because he is unable to state everything upon which it is based; or that it should be totally disregarded because the facts actually stated may not justify the conclusion. *Stubbs v. Houston*, 33 Ala. 567.

Upon the question of undue influence, counsel relied upon: *Hiss v. Weik*, 78 Md. 439; *Davis v. Calvert*, 5 G. J. 300; *Moore v. McDonald*, 68 Md. 339; 1 *Redfield on Wills*, 518; *Schouler on Wills*, sec. 242, 238; *Beach on Wills*, sec. 113; *Herster v. Herster*, 116 Pa. St. 627; *Muller v. St. Louis Hospital*, 5 Mo. Ap. 397; *Taylor v. Wilburn*, 20 Mo. 306; *Harrell v. Harrell*, 1 Duvall (Ky.) 203; *Pool v. Pool*, 33 Ala. 145; *Marsh v. Tyrrell*, 4 Eng. Ecc. Rep. 34; *Dale v. Dale*, 38 N. J. Eq. 274; *Gay v. Gillilan*, 92 Mo. 251, 264; *Lynch v. Clements*, 24 N. J. Eq. 431; *Greenwood v. Cline*, 7 Oregon, 17; *Banta v. Willerts*, 6 Demarest, 84; *Cuthbertson's Appeal*, 97 Pa. St. 171; *Wilson's Appeal*, 99 Pa. St. 545; *Clark v. Stansbury*, 49 Md. 346.

Bernard Carter (with whom was *D. Meredith Reese* on the brief), for the appellees.

The Court below instructed the jury that as no sufficient evidence was offered to show that Catherine Davis, at the time she executed her will, was not of sound and disposing mind and capable of executing a valid deed or contract, the verdict of the jury must be for the defendant, on the issue (the 4th) which raised this question.

As the law presumes every person to be of sound mind and of sufficient mental capacity to make a valid will until the contrary appears, the plaintiffs, before they had the right to have the question of the sufficiency of the mental capacity of Catherine Davis to make the will in question, at the time she made it, submitted to the jury, were bound to offer evidence legally sufficient to overcome this presumption of the law; and to do this, they were bound to offer evidence,

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which, assuming it to be true, and adding thereto the inferences which may be fairly and legitimately drawn therefrom, is sufficient to warrant the jury, in the exercise of a *reasonable intelligence*, to find that the testatrix was not of a sound and disposing mind, and capable of executing a valid deed or contract. 37 Md. 581, *Tyson v. Tyson*.

And, unless the Court can see that there is such evidence in the cause as will fairly support the verdict, it becomes the imperative duty of the Court to instruct the jury to find a verdict for the defendant; for the true principle is that if the Court is satisfied that conceding all the inferences which the jury could *justifiably* draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so. *State, use of Steever v. Union R. R.*, 70 Md. 76, 77; *State, use of Hamelin v. Malster and Reany*, 57 Md. page 309; 31 Md. 149, 150, *Clark v. Dederick*.

At the trial below the plaintiff, in order to show that Mrs. Davis was not of sound and disposing mind, and capable of making a valid deed or contract, relied: 1st. Upon the provisions of the will itself, claiming that they were unjust. 2d. Upon the testimony of the witnesses who were examined, especially the testimony of Dr. Pritchard, one of the plaintiffs. The use which may be made of the provisions of a will, in connection with the question of the mental capacity, is explained in the case of *Davis v. Calvert*, 5 Gill & J., 188, 189.

An examination of all the circumstances, so far as revealed by the testimony offered on the part of the plaintiff, will show that there is nothing in the character of the will from which any inference of mental incapacity on the part of the testatrix can be predicated. How stands the case on the question of the supposed injustice of the will? Thus, Thomas Davis has two sets of children, one (the caveatees) by Catherine Davis—Catherine Davis has two sets of children, one by Thomas Davis. Thomas Davis and Catherine Davis by their joint labors and savings, accumulate property, starting on the foundation of his property, a large

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part, at least, of which stands in his name. He dies first, and by his will, gives none of his property to their joint children, and but a small part to his children who were not her children ; and after his death, besides what he gives her of the property which had stood in his name in his lifetime, gives her some \$12,000 to \$15,000 of life insurance ; then she by her will gives to their joint children about \$10,000 out of a personal property of about \$17,000 and some real estate, small house property at Canton, whose value is not given. Can such a will afford any part of the foundation for a rational inference that the testatrix was wanting in mental capacity ? We respectfully submit, that this question can only be answered in the *negative*.

As to testamentary capacity. The testimony shows very clearly that Catherine Davis was a woman of untiring energy and industry, never satisfied unless she was actively employed ; she had unusual business capacity and a *strong will* ; her business qualities, independently of any tribute to them by the witnesses in the case, being shown by her successful and profitable management of the stores she kept, as well before as after her marriage to Mr. Davis.

In view of all that took place, in connection with the preparations for making her will and the execution of it ; the exercise of mental faculties shown in the selection of the property she wished to pass by the will, and what she did not wish to pass by the will ; the selection and appropriation to each one of her children of the several lots she wished to give to each child, and the description of the location of each of said pieces of property ; the determination to read the will herself ; the selection by her of the witnesses to the will ; the precaution she took the day she executed the will that no one should see her executing it ; the request she made that no mention should be made of the making by her of her will, and the reason she gave for the request, namely, that if it was known there might be some trouble, and she did not wish any trouble while she lived ; it is respectfully submitted that in a very marked and de-

cided manner, there is demonstrated, not only the possession by her of the fullest intelligence and mental vigor, but that she fully realized, understood and weighed the nature of the act she was performing and its consequences; and the time which elapsed between the giving of the instructions and the execution of the will, shows that nothing in connection with the matter was done in a hurry, but with full consideration and deliberation. In view then of these facts, and of the testimony offered by the plaintiffs of the strength of will, business qualities and mental vigor of Mrs. Davis, as shown in all her previous life, we respectfully submit that very strong and clear testimony must be produced, before any tribunal, in the exercise of a reasonable intelligence, could find that, at the time the will was made, she had not mental capacity to enter into a valid deed or contract.

The testimony will show that *at least*, up to two weeks before her death, on February 9, 1892, (during these two weeks she was in bed, and her condition then is not shown), and, therefore, for a period of nearly eighteen months after the date of her will, she continued not only to act and talk, but to comprehend what was said to her, and was still going about the city, as had been her custom, and that, too, in company with or visiting one or more of those of her children, who are now endeavoring to set aside her will. *But also*, that during all this time while she was thus talking and acting and going about, there is not a single instance, testified to, in which Mrs. Davis ever did or said a thing that indicated any want of mental capacity. There is no evidence that, during her whole life, she ever did or said a thing that even might be called eccentric. They say she was sometimes forgetful, but there is not a single instance of a lapse of memory testified to, to which the most intelligent and well-balanced people might not be subject.

We come now to consider the testimony of Dr. Pritchard, one of the co-heirs, the son-in-law of Mrs. Davis, and from time to time her physician. Before examining his tes-

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timony, we submit to the Court the following legal propositions : 1. That though a physician, who was sufficiently well acquainted with a testator to form an intelligent opinion of her mental capacity, may be asked to give that opinion in evidence, and may testify that, in his opinion, the mental capacity did not exist, and he need not be asked to state the facts and circumstances on which his opinion is founded ; and if he is not asked to give the reasons on which his opinion is founded, the party offering his naked opinion would have a right to have that opinion to go to the jury ; yet, if he is asked to give the *reasons* on which his opinion is based, and does give them, and the reasons he gives are such that men of ordinary knowledge can weigh, and are, in the judgment of the Court, such that no rational inference can be deduced therefrom that the testator was wanting in the requisite mental capacity, his opinion does not afford evidence legally sufficient to show such want of capacity. 2. Independently of any decision of a Court on this subject, the proposition is so in accordance with correct principles that it must be accepted. For it cannot be that a testator or any other person shall be adjudicated as of unsound mind, merely because some physician says that, in his opinion, he was of unsound mind, when the only reasons he has for such an opinion are such that when stated as the foundation for his opinion, right reason at once rejects them as furnishing any foundation for the opinion thus expressed. When a physician expresses an opinion that a testator had not sufficient mental capacity to make a valid deed or contract (and this is the test in Maryland), and says his opinion is founded on certain facts and reasons, which men of ordinary information and intelligence can weigh, then whether the conclusion he has reached is a rational conclusion, is as much open to enquiry by the Court in determining whether there is any evidence legally sufficient to show such want of mental capacity, as if these reasons were given by a layman ; for, if this were not so, and his opinion must be submitted to the jury, no

matter whether supported by his reasons or not, then no matter how foolish and absurd his reasons, the opinion must be submitted to the jury ; and if this were the law the Court would have no right to grant a new trial if the jury found in accordance with the opinion, because if the opinion of the physician must go to them, just because it is the opinion of a physician, and whether supported by any good reason or not, the jury must take the opinion and be guided by it, no matter how foolish they find the reasons.

And to this effect are the authorities. 1 *Wharton on Evi.*, sec. 451 ; *Waters v. Waters*, 35 Md. 541 ; *Brooke v. Townsend*, 7 Gill, 29 ; *Staeckhouse v. Martin*, 15 N. J. Eq. 208.

Now, so far from any act or word of Mrs. Davis testified to by Dr. Pritchard evidencing a want of mental capacity, all that is shown to have been said or done by her was most sensible ; nor is there anything shown in his testimony which affords a basis on which any one in the exercise of reasonable intelligence can conclude that her mental poise was in any way shaken.

Let the Court search the testimony of Dr. Pritchard from end to end, and it will be found, that he gives no other reasons for the opinion he interestedly and flippantly expresses, that Mrs. Davis had not, after she heard of the caveat, sufficient mental capacity to make a will, or any valid deed or contract, other than that she was sickly, had gastritis, became excited, worried and distressed over the possible consequences of the caveat, and forgot some altercations with members of the family, which he said she had mentioned to him. And it is to be remembered, as heretofore shown, that the doctor expressly states that he finds the opinion he gives only on the reasons he gives. Now we have shown that, so far as the sickness and gastritis is concerned, he admits that these had not affected her mind, and we have shown how absurd is the idea that a few acts of forgetfulness are any evidence of want of mental capacity, and we have shown how, notwithstanding her excitement,

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worry and distress, which was largely mingled with *indignation*, she steadily kept on her way, with the aid of counsel, employed by her, till she had fought the battle to a finish, and defeated the suit which had caused her the worry; and during all the time the suit lasted, did no foolish act, and uttered no words other than those marked by excellent sense, though many witnesses have testified to all she did and said during this period of time; and continued to attend to her business till a few weeks before her death.

BOYD, J., delivered the opinion of the Court.

Upon a caveat to a will of Catherine Davis issues were framed by the Orphans' Court of Baltimore City and sent to the Superior Court for trial. They presented the following questions:

1. As to the formal execution of the will.
2. As to her knowledge of its contents.
3. Whether it was procured by undue influence exercised and practised upon her.
4. Whether it was executed by her when she was of sound and disposing mind and capable of executing a valid deed or contract.

Four daughters of Catherine Davis by her former marriage, and the husbands of those who were married, were made the plaintiffs, and her children by her second marriage, together with the husband of a married daughter, were made defendants. At the trial the defendants produced the will and examined the two subscribing witnesses for the purpose of proving the execution of it. The plaintiffs then called a number of witnesses to show undue influence and want of testamentary capacity on the part of Mrs. Davis. At the conclusion of the plaintiff's case, the defendants offered three prayers, which were granted by the Court, instructing the jury to find for the defendants on all four issues. From those rulings this appeal was taken.

The first prayer referred to the first and second issues, and as there can be no doubt about the correctness of the

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rulings of the Court below in reference to them, excepting so far as the second issue may be affected by the questions raised by the third and fourth, we will proceed at once to the consideration of the other two prayers. By the third the jury was instructed that no sufficient evidence had been offered to show that the will was procured by undue influence, and therefore their verdict must be for the defendants on the third issue; and the fourth instructed them that no sufficient evidence had been offered to show that Catherine Davis was not of sound and disposing mind, capable of executing a valid deed and contract at the time she executed the will, and therefore their verdict must be for the defendants on the fourth issue.

We will first consider the fourth prayer, as that involves the foundation of all valid wills—testamentary capacity.

The burden was on the caveators to overcome the presumption of law that Mrs. Davis was of sufficient mental capacity to make a will. They having undertaken this, it is incumbent on us to examine the record to see whether the evidence offered by them was legally sufficient to fairly support a verdict if the jury found for them. As has often been said by this Court, if the facts proved are such that a rational mind might in reason and fairness from them draw the conclusion sought, it is the duty of the Court to submit the case to the jury. In the case of *Hiss v. Weik*, 78 Md. 439, the question was stated thus: "Was the evidence offered by the caveator, assuming it all to be true, as must be done when weighing its legal sufficiency upon a prayer of this character, so utterly inconclusive or devoid of probative force as not to enable an ordinarily intelligent mind to draw a rational conclusion therefrom in support of the proposition sought to be maintained by it?" Cases often arise in which plaintiffs have so signally failed to sufficiently prove some material fact upon which their right to recover depends, that there can be no doubt about the duty of the Court to determine the question without leaving it to the jury, as the Court is the exclusive judge of the legal

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sufficiency of the evidence. But the difficulty sometimes is, particularly in cases of this character, to distinguish between the weight of evidence and its legal sufficiency. The trial Judge may differ from the jury as to the former, and may think they should have found differently, or, if sitting as a juror, or in some case where he is authorized to determine the facts, he may reach a different conclusion from what a jury might have done. In this case, the plaintiffs may not have offered such evidence as would convince the learned Judge below that Mrs. Davis was not capable of making the will in controversy, but the question is whether there was not sufficient evidence to require him to submit it to the jury, under the principle of law governing such cases established by this Court.

The evidence shows that Mrs. Davis was married twice, the first time to a Mr. Jenkins. The female plaintiffs are the surviving children of that marriage. Mr. Jenkins died in 1861, and his widow married Thomas D. Davis in 1862. Shortly before the death of Mr. Jenkins, the property accumulated by his wife was lost through some of his financial troubles. She was an industrious, hard-working woman, and it was not long before she commenced to recover from her losses and to acquire more property. Mr. Davis was, at the time of their marriage, receiving a salary of \$150 per month, and continued to do so for about eighteen months, when he lost his place by reason of the establishment, with which he was connected, suspending work. He was out of his regular employment for about eight years, during which time his wife worked hard to support the family. She was assisted by those of her children of her first marriage, who were still at home, and there is testimony tending to show that Mr. Davis did very little towards supporting the family or accumulating any property during that time. He died on April 25th, 1890; and at the time of his death there was considerable property in his name, a part of which he left to his children by his former marriage, and the rest to his wife. She also received some twelve or fifteen thousand

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dollars from insurance on his life. She died on February 9th, 1892, leaving about seventeen thousand dollars of personal (including leasehold) property and six houses and lots in fee, situated in Canton, worth, probably, eight or ten thousand dollars, as stated by the Judge below. How much of this property she received from her husband is not shown, but it is evident that a considerable part of it came through his will and insurance on his life. The record does not show what amount of property she had on August the 13th, 1890, the date of the execution of her will. She left to her three children (Davis children) all of the above mentioned property, excepting four pieces of leasehold property valued at \$3,200.00, personal chattels valued at \$908.00, and cash on hand amounting to \$2,653.44. Her children by Mr. Jenkins are not mentioned in the will, but as there was no residuary clause in it or other disposition made, excepting as to those properties specifically devised to the three Davis children, the Jenkins children would be entitled to their shares in the residuum. The evidence shows conclusively that her relations with the Jenkins children were of the most pleasant character, and no good reason has been assigned why they were not mentioned in the will, excepting the contention by the appellees that it was because most of the property came from Mr. Davis, and hence she may have felt under obligations to leave it to his children. But the evidence does certainly tend to show that whatever may have been the facts as to how the property was *held* when Mr. Davis died, his wife was entitled to the credit of being largely instrumental in acquiring it and that she paid at least some of the life insurance premiums. If it be conceded then that most of the property stood in his name when he died, that fact of itself could not wholly account for the omission of the Jenkins children from their mother's will. Of course it is not sufficient to avoid a will to show that a testator has left his estate to some children to the exclusion of others without any apparently valid reasons for it, as the testator may have had what to him at least seemed to be sufficient reasons,

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but which are not disclosed by the testimony. But in passing upon questions of this kind it is proper to consider all the circumstances and surroundings of the parties that could throw any light upon the subject. In this case we cannot say there is *no evidence* of an unreasonable inequality in the disposition of the estate of Mrs. Davis, because if it be true that the property she was possessed of at the time of her death was acquired by her labor and skill, and particularly if the caveators, or some of them, materially helped her to do so, it would seem unreasonable, without some explanation, for her to make such a bountiful provision for three of her children and not even name the other four in her will. But we must pass on to the main questions in the case.

The caveators produced as a witness, in addition to the daughters and some intimate friends of the testatrix, a practising physician who was her son-in-law, and knew her socially and professionally for a number of years. He testified that during a period of time mentioned by him, which included the date of the will, Mrs. Davis was not of sound and disposing mind, capable of executing a valid deed or contract. It is well-settled in this State, that a physician can testify as to the mental capacity of the testator, without first stating the facts and circumstances on which his opinion was formed. That is because he is presumed to have become, from special study and experience, familiar with the symptoms of mental diseases, and therefore qualified to assist the Court and jury in reaching a correct conclusion. It is clear that the opinion of a medical expert on that subject is ordinarily not only some evidence, but generally very important evidence to go to the jury, particularly if he was well acquainted with the testator and attended him professionally. But it is contended by the learned counsel for the appellees, that admitting this to be true, yet if the medical expert gives the reasons upon which his opinion is founded, and they are such as men of ordinary knowledge can weigh, and are, in the judgment of the Court, such as

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no rational inference can be deduced therefrom that the testator was wanting in the required mental capacity, his opinion does not afford evidence legally sufficient to show such want of capacity. As we understand this proposition of law we are not prepared to dispute it. Merely because a witness is an expert does not require the Court to be bound by his opinion, if it is founded on such reasons as are clear absurdities. If, for example, a physician were to testify that in his opinion a testator was not of sound and disposing mind, capable of executing a valid deed or contract, and would in his further examination say, that the *only* reason he had for such opinion was that the testator used patent medicines, or was a member of some religious or political faith other than his own, such opinion would be based on a foundation so clearly repugnant to right reason that a Court would not hesitate to instruct the jury it was not sufficient to support a verdict. But we do not think the testimony of Dr. Pritchard comes within the rule sought to be established by the appellees. His evidence was in some respects contradictory, but that was clearly for the jury and not for the Court to pass upon. He testified in substance, that after the death of Mr. Davis a caveat to his will was filed by his children by a former marriage, and that this affected Mrs. Davis' mind. The caveat was filed in the latter part of the May, 1890, the will executed August 13th, 1890, and she went to Saratoga for her health on August 14th, 1890. He swore that in his opinion she was not of sound and disposing mind, capable of executing a valid deed or contract between the filing of the caveat and her going to Saratoga. He said she came to see him every few days, consulted him about what she was to do and he found her very much excited. He also said, "She was nothing as she had formerly been, she could be very easily persuaded; now that is my opinion, that she could be very easily persuaded to do probably absurd things, if any one would try to do so. She was forgetful at times; not every day. Some days she would say things and the next time you would see her she

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would contradict it entirely." Again he said, "On days she would have a few lucid moments; you can see that in a lunatic asylum." He further said, "Well, she was complaining of her head and headache, and then she would be saying so many funny things and contradicting them at other times again, and saying that she never had mentioned them." His evidence also showed that Mrs. Davis had been in bad health for some time; that she had chronic gastritis, and that "this disease itself does weaken the mind, and it does not require so much excitement then to upset it." He testified to a number of other things, that, in his opinion, affected the condition of her mind, and when asked on cross-examination, "was there any thing else that she said?" he replied, "Well, I can't remember just now all that she did say." Without going into further particulars about his testimony, it is sufficient to say that it showed that he knew the testatrix well, had frequent conversations with her and opportunities to observe her mental condition, and he expressed the opinion above stated. We do not think that the reasons given by him, especially as he says that he cannot recall all that she said, are "so utterly inconclusive or devoid of probative force," as to justify the Court in withholding his testimony from the jury. It may be true that the Judge would have been fully justified in finding for the appellees on this testimony, if the case had been tried before him, but that is not the test. It is almost impossible for a witness to recall upon the witness stand every word or act of a person about whose mental condition he is testifying. It is still more difficult to convey to others all the impressions made on one's mind, when coming in frequent contact with a person alleged to be affected with some mental trouble. As was said in *Brooke v. Townshend*, 7 Gill, 28, in speaking of the admissibility of the testimony of a *non-professional* witness, "The impression made upon the mind of a witness by the conduct, manner, bearing, conversation, appearance and acts of the testator in various business transactions for a long series of years is not mere

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opinion, it is knowledge." In the case of *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, the Court, in deciding that an opinion of a non-professional witness as to the mental condition of a party can be given, in connection with a statement of the facts and circumstances within his personal knowledge, said, "If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and thus, without the least intimation of any opinion he has formed of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject, shall have so charged their memories with these matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the impression which has been made upon his mind; and when this is collected, can it be doubted but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?"

Is not this equally true as to the evidence of professional men? Their naked opinions, without giving the facts and circumstances upon which they are founded, are admissible, as we have already said, because they are supposed to have been familiar with symptoms of mental disease by study and experience. The appearance of the unfortunate one may enter largely into the reasons which lead the physician to a conclusion. A busy physician certainly ought not to be expected to recall and state all the facts and circumstances upon which his opinion is founded, even though his patient be his mother-in-law.

Mrs. Crockett said her mother was never the same after the caveat was filed; that "she was more like she was half crazy than anything else." "My mother was both broke in body and mind;" that her mother went to Saratoga "for her

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health and her mind also," and used other similar expressions. Mrs. White, an intimate friend, who went with Mrs. Davis to Saratoga, said: "She was changed; she was melancholy, and she was very weak and nervous." Miss Dinsmore said that she "considered that both mentally and physically she was a wreck"—although she afterwards qualified it somewhat. A number of other similar expressions were used by the witnesses which are unnecessary to quote. We are satisfied from an examination of the whole record that there was sufficient evidence on the question of mental capacity to entitle the caveators to have the jury pass upon it; and, therefore, there was error in granting the fourth prayer.

We do not deem it necessary to go into any extended discussion of the third prayer. It is sufficient to say that in many respects there is a marked difference between this case and that of *Hiss v. Weik*, 78 Md. 439, relied on by the appellant. The testimony in that case shows that Bishop Ames' will was made on the 7th of April, 1879, and that he died on the 25th of the same month. Mrs. Hiss received a large portion of his estate to the exclusion of an insane son, and that son's dependent daughter, and very little was left to an invalid daughter. Three days before the will was made the testator conveyed to Mrs. Hiss for the nominal consideration of five dollars and natural love and affection, real estate in Baltimore City valued at forty thousand dollars. The evidence shows that she had said that she had great influence over her father, that he would do anything that she would ask him to do. There were many things in that case, which, taken together, gave some evidence of undue influence, and therefore this Court thought the Court below was right in submitting the case to the jury.

In this case Mrs. Davis lived nearly eighteen months after she made the will. Although she was constantly with the caveators, she never told them she had any desire to change her will, or even that she had made one. There is no evidence that any of the caveatees knew she had. Much

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of the evidence of the plaintiffs is to the effect that the caveatees did not treat Mrs. Davis very kindly; if that be true, it was certainly not the kind of treatment that would likely exert an undue influence over her for their own benefit. If the jury believed that the property in controversy had belonged to Mr. Davis, then that would be some explanation of Mrs. Davis leaving it to his and her children to the exclusion of the others. There is no evidence in this record to show that in point of fact there was any influence exerted or attempted over the testatrix by the caveatees, or any of them, prior to or at the time of the execution of her will; and we do not think that the facts of this case are parallel with those in *Hiss v. Weik*, or that the decision in that case necessarily controls this. Without deem-ing it necessary to prolong this opinion further, it sufficeth to say that we do not feel justified in reversing the rulings of the Court below on the question of undue influence, but without meaning to intimate that the evidence does establish the fact that Mrs. Davis was not mentally capable of making a will on August 13th, 1890, we are of the opinion that the evidence of Dr. Pritchard, especially when taken in connection with the other testimony, was of such character as to entitle the appellants to have it submitted to the considera-tion of the jury. We think, therefore, there was error in the refusal of the Court below to do so.

Rulings reversed and new trial awarded.

(Decided March 27th, 1895.)

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**ALCAEUS HOOPER *vs.* THEODORE AND JAMES E.
HOOPER.**

Guaranty—Measure of Liability of Guarantors—Limitations—Payment—Interest on Interest—Contribution Between Guarantors.

A guaranty is a mercantile instrument to be liberally construed, according to the intention of the parties, as manifested by the terms of the guaranty taken in connection with the subject-matter, and in order to ascertain the intention of the parties, the circumstances of the whole transaction may be considered.

The Statute of Limitations begins to run in favor of a guarantor from the time he is liable to suit, and this may or may not be the same time the principal debtor becomes so liable.

When a guarantor agrees to pay a certain debt of the principal upon thirty days notice, his liability is not enforceable until after the expiration of the designated time, and the Statute of Limitations does not begin to run before that time.

The liability of a guarantor is coextensive with that of the principal, unless it be expressly limited. And, so, where the principal debtor makes a part payment before the Statute of Limitations has attached, this fixes a new date from which the statute begins to run as to a guarantor or surety.

Where one of several guarantors pays the debt before it has been barred by limitations, he is entitled to demand contribution from the other guarantors, and the Statute of Limitations does not begin to run against such demand until the date of such payment.

Mere delay by the creditor in demanding payment from the principal debtor will not discharge a guarantor, unless the delay has been unreasonable and loss and injury have resulted therefrom to the guarantor. If, during the whole time, the principal debtor was unable to pay, the delay has not injured the guarantor.

A was indebted to the W. Co. to the extent of \$41,224. The W. Co. was indebted to B in the sum of \$23,000, and to C in the sum of \$60,000, and these sums stood to their credit on the books of the company. B and C were officers of the company, and also guarantors, together with D, of A's debt to the company. They caused entries to be made on the books of the W. Co., by which B's account and C's account were each debited with \$20,612, and the total of these two debits was credited upon A's account. The money was in bank, subject to the control of the W. Co. Held, that the result

of this transaction was to extinguish A's debt, and was such a payment to the W. Co. of the amount due under the guaranty as entitled B and C to demand contribution from their co-guarantor, D.

Where the guaranty is of any sum not exceeding \$35,000, for goods sold and money loaned to a certain party, and there is no provision made for an immediate payment, the guaranty embraces also interest upon the capital sum mentioned.

Where the parties to a transaction amongst themselves treat accrued interest as an augmentation of the original principal sum, and charge up interest thereon, one of the parties cannot afterwards object to such method of computation as a compounding of interest.

In April, 1889, A, B and C executed a guaranty by which they jointly and severally agreed to pay to the W. Co., on thirty days notice, any sum that might then or thereafter be due to the W. Co., not exceeding \$35,000, for goods sold and money loaned to D, each of said guarantors reserving the right to withdraw from the agreement by written notice to the others and to the company, such notice, however, not to cancel his obligation as to indebtedness existing when given. Under this guaranty, loans were made to D by the W. Co., beginning in October, 1888, and extending to June, 1889. In 1890 and in 1891 D paid the interest on the indebtedness, and on February 7, 1894, gave a note for part of the principal and interest, which was credited on the account as a payment. Up to July, 1891, C was the treasurer of the W. Co., and, in accordance with their custom, charged up interest on the account every four months. On April 15, 1891, C notified the other guarantors and the W. Co. that he declined to be responsible under the guaranty for any indebtedness which should be incurred after that date. On March 26, 1894, the W. Co. demanded payment of the indebtedness from D and from the guarantors. D was unable to pay, and A and B notified C that they would pay the same, and requested him to contribute his proportion. On April 2, 1894, A and B paid to the W. Co. the sum of \$41,224, being the amount of D's indebtedness, including interest, calculated as above mentioned, and on the next day filed a bill for contribution against their co-guarantor, C. This bill was dismissed because it was held that the defendant's liability under the guaranty did not begin until after thirty days notice, and the notice from the W. Co. had been given less than thirty days before the suit was instituted. On May 29, 1894, the present bill was filed, asking for a decree compelling the defendant C to contribute and pay to A and B his proportion of the debt covered by the guaranty, and so paid by the plaintiffs. The guarantors and the principal debtor were brothers, and the object of the guaranty was to aid D, who was less prosperous than the others. The defendant relied chiefly upon the Statute of Limitations. *Held,*

1st. That the intention of the parties was not that the guarantors should only be liable for three years (the period of the Statute of Limitations) from the date of the guaranty, or for three years from the date of the

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last item in the account due to the W. Co., but that they should continue liable so long as the liability of the principal debtor continued a subsisting, undischarged indebtedness, and that their conditional liability to pay became a fixed obligation, as against them, not at the time the principal debtor was liable to suit, but upon the expiration of the thirty days notice from the W. Co.

2nd. That by the terms of the guaranty, the guarantors could not be required to pay, and could not be sued for a failure to pay until after the expiration of a thirty days' notice from the W. Co., and therefore the Statute of Limitation did not begin to run in their favor before that time, however it might have affected the principal debtor.

3rd. That where a claim is enforceable against the principal debtor, it is also enforceable against the guarantors, their liability being co-extensive with his, and since payments on account of the indebtedness were made by D, the principal debtor, before the expiration of three years from the time it accrued, his liability to the W. Co. was not barred by limitations at the time the plaintiffs paid the same, and it was consequently not barred as against the guarantors.

4th. That under the circumstances of this case, the Statute of Limitations did not begin to run against the claim of the plaintiffs for contribution from their co-guarantor until the date of the payment by them to the creditor.

5th. That since there was no evidence that the principal debtor D was at any time able to discharge the indebtedness, or that he was less able to do so in March, 1894, when demand was made than previously, the defendant was not injured by the delay in demanding payment, and was not entitled to rely upon the defence of *laches*.

6th. That since the defendant had assented to the practice of the W. Co. in charging up interest on the account of D every four months, he could not now question its propriety, and that the limitation of the sum to be loaned or advanced by the W. Co. to \$35,000 was to be construed as exclusive of interest thereon.

Appeal from a decree of Circuit Court No. 2, of Baltimore City (WICKES, J.), by which it was adjudged that the defendant pay to the plaintiffs the sum of \$14,329.97. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

Edward Otis Hinkley and Thos. Foley Hisky (with whom was John T. Morris on the brief), for the appellant.

The appellant contends: (1.) That on a true construction of said guaranty, the Statute of Limitations began to run on so much of said indebtedness as was in existence at the date of the guaranty, from that date; and as to the several items of indebtedness accruing thereafter, due by William J. Hooper to the Woodberry Manufacturing Company, the Statute of Limitations began to run, as to each item, from the day of its charge. (2.) That there is nothing in the case to take it out of the Statute of Limitations. (3.) That the withdrawal of the appellant from the guaranty, in pursuance of its terms, did not stop the statute from running, nor operate in any manner other than to stop the said company from lending more money to William J. Hooper on the faith of it. (4.) That the fact of the appellant having been treasurer down to 15th July, 1891, did not stop the statute from running. (5.) That the conversation of William J. Hooper with the appellant is not sufficient to take the case out of the Statute of Limitations. (6.) That the utmost that appellees can *claim* is one-third of the sum of \$35,000, and no sum beyond that amount could be recovered; since the sum mentioned in the guaranty is in the nature of a penalty in a bond, and it was the fault of the creditor that interest was "piled up" to more than \$6,000, with the result of which neglect appellant should not be charged. (7.) That compound interest cannot be charged in any manner whatever; and no interest was chargeable on the sum guaranteed until demand was made. (8.) That the payment alleged to have been made by the appellees in the manner adopted, as shown in this case, namely, by a mere charge on the ledger of the Woodberry Co., is not a sufficient payment, under the circumstances of this cause, to entitle the appellees to force appellant to contribute at all. (9.) That under the peculiar circumstances of this case, *laches* is a good defence. (10.) That the taking of a promissory note, at six months, from Wm. J. Hooper by the Woodberry Co., without the knowledge or consent of the appellant, operated to discharge him, on the ground that

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time given by a creditor to the principal exonerates the surety.

The Statute of Limitations ordinarily begins to run when the right to sue the debtor commences. *Lamb v. Ewing*, 12 U. S. App. 22; *Codman v. Rogers*, 10 Pick. 112; *Wood on Limitations*, sec. 146.

In cases where demand is unnecessary to fix the liability, no notice to the guarantor is required before suit can be brought. *Wood on Limitations*, vol. 1, pages 313 and 402. "Such absolute guaranty takes effect as soon as it is acted upon." *Yancey v. Brown*, 3 Sneed (Tenn.) 89. "Where the guarantor is not prejudiced by want of notice, he is liable as if notified." *Simons v. Steele*, 36 N. H. at 81.

In *Little v. Edwards*, 69 Md. 499, this Court held that the statute began to run from the date of the guaranty of the judgment, because the assignee of said judgment could have then issued execution on it. Could not the creditor in this case, upon the making of each loan, immediately have given notice of thirty days, according to the terms of the guaranty, and brought suit at the expiration of that time, had payment not been made? If so, then the statute began to run as to each loan from its date, for "when the account is all on one side, it has not the character of mutual accounts, and so far as the Statute of Limitations is concerned, the cause of action arises from the date of each item; and they are respectively barred when more than six years (three years in Maryland) have intervened between their dates and the commencement of suit." *Hodge v. Manley*, 25 Vermont R. 210.

The last loan, as per appellees' account filed with the bill was made June 4, 1889, and this suit was not commenced until May 29, 1894, thus leaving the whole amount barred by the Statute of Limitations. In *Offord v. Davies*, 31 L. J. N. S. (C. P.) page 319, there was a guaranty for twelve months for all such bills as plaintiff might discount, not exceeding £600; and EARL, C. J., in his opinion, said: "This promise itself creates no obligation; it is

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in effect conditioned to be binding if the plaintiff acts upon it." * * * There were certain bills discounted and a revocation, and the Court held each discount to be a *separate transaction*, creating a liability on the defendants until it is repaid." See also *Coulthart, &c., v. Clementson*, L. R. 5 Q. B. Div. 42.

The contract of each guarantor was his several contract, and one guarantor cannot, by paying at any time he sees fit, revive the debt as to the others. *Hatchett v. Pogram*, 21 La. Ann. 722; *Kimball v. Cummins*, 3 Metc. (Ky.) 327; *Theobald on Suretyship*, 113; *Biscoe v. Jenkins*, 5 Eng. (Ark.) 108; *Cross v. Allen*, 141 U. S. 536.

The payment, it must be noted, is alleged to have been made by the appellees in April, 1894, more than five years after the date of the guaranty, taken as of April 1, 1889, and nearly five years after the limit of the guaranty had been reached. "Part payment by one of several joint debtors of a debt barred by limitations revives the debt *as to him*, and forms a new point from which the statute begins to run, but does not revive it as against the other joint debtors." *Border v. Peay*, 20 Ark. 293. In Maryland, payment of interest on a bond will not take it out of the Statute of Limitations, nor will an express acknowledgment of the debt revive the remedy upon a bond barred by the Act. *Carroll v. Waring*, 3 G. & J. 491; *Cocke v. Hoffman*, 5 Lea (Tenn.) 105 (A. D. 1880); *Van Keuren v. Parmelee*, 2 Comst. 523; *Wood on Limitations*, 2d edition, section 145, page 398.

The Court below seemed to be of opinion, notwithstanding the provision as to notice of withdrawal provided that "such notice should not cancel his obligation as to indebtedness existing when it is given," that said notice was an acknowledgement by appellant made at its date sufficient to remove the bar of the statute. But most assuredly such a provision was entirely unnecessary. No notice that he intended to withdraw for the future could relieve him of his responsibility under the guaranty, as to money loaned pre-

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viously on the faith of it. As a matter of fact, the intention of the parties probably was that if any one withdrew, the existing state of affairs was not to be thereby altered. If then his liabilities for money loaned remained, why did not his rights acquired under the law? Further than that, no acknowledgment is ever *forced* out of language. This Court has decided it must be clear and fairly shown the admission of the debtor that the debt had never been paid. In other words, he must *recognize his debt*. *Belzshoover v. Yewell*, 11 G. & J. at 216.

The decree signed in this case was for \$14,329.97, and interest from date, which was for one-third of \$35,000, principal and interest, and interest compounded thereon. But appellant contends that the amount to be recovered cannot exceed \$35,000, and interest from day of demand on so much of the debt as was principal. Clearly the object of fixing a limit to the liability of the guarantors extended as well to any claim for interest prior to demand as for principal. Such would be a reasonable interpretation according to the "intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made." The liability cannot be extended by implication or otherwise, beyond the precise terms of the agreement. *Ellis v. Emmanuel*, 1 Ex. Div. 157 (A. D. 1876), and cases therein reviewed; *McGoveney v. The State*, 20 Ohio, 93; *Evans v. Brady*, 17 Wend. 422; *Bank of Steubenville v. Carroll's Admrs.*, 5 Ohio, 214; *Mix v. Singleton*, 86 Ill. 194.

And the allowance of compound interest was erroneous. *Rayner v. Bryson*, 29 Md. 480; *Dennis v. Dennis*, 15 Md. 73; *Hambleton v. Glenn*, 72 Md. 351.

Before one guarantor can claim contribution, he must show that he has paid more than his share. And appellant contends that this throws the *burden of proof* on the appellees, to show that payment *actually* was made; and alleges that they have not done so. It is true that certain *inter-ledgering* on the books of the Woodberry Manufacturing

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Company was done, viz, that the account of William J. Hooper was credited with \$41,224.17, and one-half of this amount was debited to the account of each of appellees as ordered by them. No check was given—no cash passed. Thereupon the appellee, James E. Hooper, as treasurer, signed a receipt for \$41,224.17, as received from himself and Mr. Theodore Hooper, in payment of "\$35,000, with interest from April 15, 1891, to April 2, 1894," guaranteed by themselves and appellant. Now, the Woodberry Manufacturing Company kept no bank account. The funds of the company, appellees say, were deposited in four banks, two of which were in Baltimore City, in the name of Wil-E. Hooper & Sons.

Now the burden is on them to show that this interledging had exactly the same effect as if these gentlemen had each withdrawn from their respective funds in the hands of the company, \$20,612.08, and each paid that amount to an outside party. To do this (1) each must have had to his credit more than that amount; and (2) they must *affirmatively show* that there were funds in hand belonging to said company, sufficient to have allowed such a withdrawal. Appellant contends that they have not done so.

Frank Gosnell (with whom was *T. M. Lanahan* on the brief), for the appellees.

We contend that the debt due by William J. Hooper to the Woodberry Manufacturing Company never was barred, and that consequently there never was a time when appellant could not have been lawfully called upon to pay the same as guarantor. This is clear for the following reasons:

1st. That when he gave the notice of April 15th, 1891, he recognized the amount then due as a valid subsisting debt, for which he was responsible by the terms of the guaranty, and which amount then exceeded \$35,000, principal and interest, according to the books of the corporation, and that he acknowledged his liability down to September 18, 1891, when he produced the original guaranty which he then held in his custody as treasurer.

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2d. The collection by appellant from time to time, as treasurer of the corporation, from William J. Hooper, of the interest on the account down to and including that paid March 6, 1891, and the payment within three years thereafter of the last item of interest of \$779.62, to-wit, February 7, 1894, prevented the bar of the statute from ever attaching. This Court holding that the payment by the principal year by year of interest upon an obligation before the statute has attached will prevent the Statute of Limitations from attaching in favor of the surety. *Ellicott v. Nichols*, 7 Gill, 86, 101-104; *Schindel v. Gates*, 46 Md. 604, 614-616; *Burgoon v. Bixler*, 55 Md. 392.

3d. "The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, *i. e.*, until the claim of the principal creditor has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety." *Davies v. Humphreys*, 6 M. & W. 153-169; *Ex parte Snowden*, L. R. 17, Ch. Div. 44; *Wolmershausen v. Gullich*, [1893,] 2 Ch. 514-529; *Peaslee v. Breed*, 10 N. H. 489; *Bordman v. Paige*, 11 N. H. 438; *Wood v. Leland*, 1 Metc. 387. The reason of this rule is that "the right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his joint share of the joint burden, and this equity having once arisen between co-sureties, neither the creditor, the principal, the Statute of Limitations, nor the death of the party, can take it away." *Camp v. Bostwick*, 20 Ohio St. 347; *Martin v. Franz*, 127 Pa. St. 389.

4th. Should this Court, however, be of the opinion that the debt was barred as against the appellant at the time the appellees paid it to the Woodberry Co., still this suit is well brought, because, after the passing of the order dismissing our first suit, the appellant sent for his brother William, acknowledged to him his liability and suggested an arrangement by which his one-third might be paid. *Oliver v. Gray*

I H. & G. 204; *Stewart v. Garrett*, 63 Md. 392; *Cooper v. Alcott*, 1 Ct. App. D. C. 123.

5th. Appellant is estopped from setting up the statute as a bar to this suit, by reason of the position taken by him in his demurrer to our first suit. A party may not take contradictory positions, but is bound by his first election. *R. R. Co. v. Howard*, 13 How. 307; *Ry. Co. v. McCarthy*, 96 U. S. 267; *Thompson v. Howard*, 31 Mich. 309; *Mobberly v. Mobberly*, 60 Md. 376; *Edes v. Garey*, 46 Md. 41; *Hall v. McCann*, 51 Md. 350; *Chacquote v. Ortel*, 60 Cal. 601.

Appellant seeks to evade payment of his obligation by pleading that the loans made by the Woodberry Manufacturing Company to William J. Hooper, were *ultra vires*. This defense is all the more lamentable because he was *treasurer* of the corporation at the time the loans were made. His attempt thus to escape payment of his just debt is not worthy of further consideration. A recent decision of this Court conclusively disposes of his contention. *Haacke v. Knights of Liberty, &c., Club*, 76 Md. 429.

The evidence conclusively shows that the note of \$779.62, given by William J. Hooper, on the 6th of March, 1894, was taken by the corporation *on account of overdue interest*, and that after crediting the same, the full amount paid by the appellees under the guaranty was still due to the corporation by William J. Hooper, it cannot, therefore, be seen where an extension of time was given to the debtor such as would release the appellant as guarantor; in fact, no extension was ever given. The corporation could then, notwithstanding the taking of that note, and could, at all times, have proceeded against the debtor for the balance due after giving credit for the note, and at no time from the giving of the guaranty down to the time of the payment by the appellees, was the corporation prevented from collecting the amount due it, nor was the appellant prevented from paying his obligation to the corporation, and being thereby subrogated to its rights against the appellees and the debtor, had he seen fit so to do.

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McSHERRY, J., delivered the opinion of the Court.

To understand the questions raised in the record now before us, it is necessary, at the threshold, to outline briefly the material facts disclosed by the bill, the answer and the evidence.

The late William E. Hooper was possessed at the time of his death, in eighteen hundred and eighty-five, of an undivided one-half interest in certain lands and mill property, and three of his four sons, viz., Theodore, James E. and Alcaeus, were possessed in equal shares of the remaining undivided one-half interest therein; and the father and those three sons were then, and previously had been, carrying on as co-partners, the business of cotton duck manufacturers, under the firm name of William E. Hooper & Sons. The elder Mr. Hooper, by his last will and testament, authorized his executors to unite with the other joint-owners of the mill property in forming a corporation, and in eighteen hundred and eighty-six, a body corporate, known as the Woodberry Manufacturing Company, was duly chartered. One-half of the capital stock of this company was issued to the executors and trustees named in the will of William E. Hooper, in payment for the interest which he, in his lifetime, had held in the mill property, and the other half was issued in equal thirds to the other three joint owners, in payment for their respective interests in the same property. The other son, William J. Hooper, was largely indebted to the firm of William E. Hooper & Sons. His father had guaranteed the payment of that indebtedness to the firm, and after the death of the father, William's debt to the firm was accordingly charged to the father's account, thus making William a debtor to the estate for the amount which he had owed the firm; and when William was credited as against this with his part of his father's estate, it did not extinguish that indebtedness in full, but still left him, as to the surplus, a debtor to the estate. In 1886 William failed in business and conveyed his property to trustees for the benefit of his creditors. In the year

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1889 he was indebted to the Woodberry Manufacturing Company, whose stock was held, as just stated, by his father's estate and by his three brothers, and he desired to obtain from that company further advances of money and goods. Accordingly his three brothers, two of whom are the plaintiffs in this case, and one of whom is the defendant, executed and delivered to the Woodberry Manufacturing Company the following guaranty: "Baltimore, April, 1889. In consideration of the sum of five dollars, the receipt whereof is hereby acknowledged, we, Theodore Hooper, James E. Hooper and Alcaeus Hooper, jointly and severally agree to pay on thirty days' notice, to the firm of William E. Hooper & Sons, and to the Woodberry Manufacturing Company of Baltimore County, the latter a body corporate of the State of Maryland, any sum that may now or may hereafter be due said firm and said corporation, not exceeding in the aggregate to both thirty-five thousand dollars, for goods sold and money loaned to William J. Hooper individually or trading as William J. Hooper & Co., each of us reserving to himself the right to withdraw from this agreement by written notice to each of the other signers and to said firm and to said corporation; such notice, however, not to cancel his obligation as to indebtedness existing when it is given." Then follow other provisions which need not be alluded to. The paper was signed by the three promisors named therein. The advances or loans to which this guaranty relates began October the eighth, 1888, and ran through the month of December of that year, and the months of March, April, May, down to June the fourth, 1889, up to which latter date, exclusive of interest, they aggregated \$33,800.00. Interest to September the thirtieth, of the same year, amounting to \$1,047.77, was added, making the sum total due on that date \$34,847.77. On this sum, William J. Hooper paid, in 1890, to the Woodberry Company three instalments of interest, and on March the sixth, 1891, he paid a fourth instalment, which settled the interest in full to February the first, 1891. No further interest was paid by

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him till February the seventh, 1894, when he gave his note, payable in six months, for a part of the principal and interest then due, and this was credited on the account as a payment. During the whole period of time covering these advances to William J. Hooper, and up to July, 1891, the defendant, Alcaeus Hooper, was treasurer of the Woodberry Manufacturing Company. On April the fifteenth, 1891, Alcaeus Hooper gave notice in writing to the Woodberry Company, to William E. Hooper & Sons, to William J. Hooper and Theodore and James E. Hooper, that he declined "to be responsible for any * * * * indebtedness which shall be incurred on and after the date of this notice, under the guaranty of April, 1889, and that he withdrew from said agreement." On March the twenty-sixth, 1894, the Woodberry Company demanded payment from William J. Hooper of the amount due by him to it, and on the same day requested the three guarantors to pay to it the amount whose payment was jointly and severally guaranteed by them under the agreement of April, 1889. William J. Hooper made answer that he would be unable to settle during that year, and the evidence shows that such was the fact. On the day following, the plaintiffs addressed a letter to the defendant advising him that they would, on the second day of the ensuing April, meet this obligation to the Woodberry Company, and requesting him to contribute his share or proportion thereof. They received no reply, and on the day designated they paid to the Woodberry Company, in the manner which will be explained later on, the sum of \$41,224.17, being the amount, including interest, due by William J. Hooper. On the same day they notified the defendant that they had paid the money and they thereupon made a formal demand on him for contribution. On the next day, April the third, the plaintiffs filed a bill in equity against the defendant for contribution. On May the fourteenth, the defendant filed a demurrer to that bill and relied, among other things, upon the fact that the suit had been prematurely brought. As under the guaranty,

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according to his construction of it, no action could be instituted thereon until after the expiration of the thirty days' notice therein provided for, and as the notice actually given bore date March the twenty-sixth, the bill filed on April the second was filed prior to the expiration of the thirty days from the date of the notice, and therefore was filed prematurely. The Court below, adopting that view, dismissed the bill without prejudice, on May the twenty-eighth, and on the next day the bill now before us was filed. The prayer of this bill, as it was of the former one, is for a decree compelling the defendant, one of the guarantors, to contribute and pay to the plaintiffs, the other guarantors, the amount claimed to be due to them by him on account of the payment made by them for him, to the Woodberry Company, of his proportion of the debt covered by the guaranty of April, 1889. In his answer he relies on the Statute of Limitations, and insists that he is not liable after three years from the date of the guaranty, or at most, not after three years from the date of the last loan by the Woodberry Company to William J. Hooper; and he denies that the plaintiffs have paid any amount under the guaranty at all.

There is no dispute that the guaranty was executed, delivered and accepted, or that the Woodberry Company advanced money and delivered goods to William J. Hooper; nor is there the slightest pretence that Alcaeus Hooper has ever paid a single cent to reimburse his brothers any portion of the amount they paid for him under the guaranty. The defendant seeks to escape all liability to the plaintiffs, and to avoid a compliance with the obligation which he deliberately, and with full knowledge of all the facts, assumed, by now taking refuge behind the plea of the Statute of Limitations. Utterly ignoring whatever of equity there is in the claim which they prefer against him, and without venturing to go upon the witness stand or to question under his oath any allegation of the bill, he repudiates the liability which has arisen under his explicit and formal contract; and he repudiates it because more than three

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years have elapsed between the date of that contract and the time when these proceedings were begun. It is difficult to conjecture, how, under all the circumstances of this case, a less meritorious defence could have been attempted.

Whilst the undertaking of a guarantor technically differs from that of a surety (*Kramph v. Hats*, 52 Pa. St. 525), still the contract of guaranty is the obligation of a surety. *Davis v. Wells, Fargo & Co.*, 104 U. S. 159. Both are accessory contracts ; that of a surety is in some sense conditional ; that of a guarantor is strictly so. A guaranty is a secondary, whilst a suretyship is a primary obligation. A guaranty is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties. *Lee v. Dick*, 10 Pet. 482 ; *Mauran v. Bullus*, 16 Pet. 528 ; *Bell v. Bruen*, 1 How. 169 ; *Davis v. Wells, Fargo & Co.*, 104 U. S. 159 ; *Mussey v. Rayner*, 22 Pick. 228. The contract of a surety must have such a construction given to it as will carry out the intention of the parties to it. *Englar v. Peoples' Fire Ins. Co.* 46 Md. 333 ; *McShane & Rogers v. Howard Bank*, 73 Md. 135, and the contract of a guarantor ought not to be interpreted by any different rule.

When it is remembered that the three guarantors obviously intended to aid in a substantial manner their less prosperous brother who had but recently before the date of the guaranty assigned his property for the benefit of his creditors and who was, therefore, practically beginning his

business career anew, and when the terms themselves of the guaranty are considered, and the close kinship and intimate business relations existing between all the parties to the transaction are borne in mind, it may be fairly presumed that the intention of all the parties to the instrument was, not that the guarantors should only be liable for three years from the date of the guaranty, or for three years from the date of the last item in the account due to the Woodberry Company, but that they should remain answerable so long as the liability of the principal debtor continued a subsisting, undischarged indebtedness, and that their conditional liability to pay would become a fixed and enforceable obligation as against them as soon as the thirty-days' notice should be given and should expire, if the principal debtor were then unable to pay. There is nothing on the face of the guaranty to indicate that the parties to it contemplated that the money loaned by the Woodberry Company was to be repaid by the debtor within three years from its date; and much less is there a single word or phrase which implies that they understood or designed that their liability was unconditionally and absolutely restricted or confined to that period of time. On the contrary, giving to the instrument a perfectly natural and unrestrained construction, it discloses a purpose to continue liable without reference to such a limit, and it, in terms, fixes another period for payment by the guarantors, from which date and no other the Statute of Limitations began to run in their favor. Now, the Statute of Limitations commences running in favor of a surety or guarantor from the time he is liable to suit, and this may or may not be the same time the principal becomes so liable. 1 *Brand. on Sutl & Gur.* sec. 143. When, then, were the guarantors, according to the terms of their contract interpreted in the light of all the surrounding circumstances, bound to pay to the Woodberry Company the amount which they jointly and severally promised to pay? Was it on demand? Or, at once, upon the execution and delivery of the paper? Or, in three years thereafter? Or,

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at the time the principal debtor was liable to be sued? They jointly and severally agreed "to pay on thirty days notice." That is the period of time fixed in the guaranty. Until the notice had been given and the thirty days had expired they were obviously not bound to pay. The notice was a condition precedent to the right of the creditor to sue. Even a negotiable promissory note payable upon a condition, does not mature until the condition has happened. *3 Rand. Com. Paper*, sec. 1050; and a guaranty whose words are to be taken as strongly against the guarantor as the sense will admit, *Drummond v. Prestman*, 12 Wheat. 515, is not, upon principle, subject to a different rule. The guarantors had the undoubted right to stipulate that their liability should not be enforceable until after the expiration of a designated time, and having incorporated that provision in the contract both they and the creditor were bound thereby. The financial condition of William J. Hooper, his large indebtedness to the estate of his father, which he was unable to pay; the fiduciary relations which the guarantors held towards the estate as executors and trustees, and the evident purpose they personally had in view to help their brother by advances, which though made in the name of the Woodberry Company, were largely in point of fact the money of the estate, because the estate was a holder of much of the company's capital stock; and their intimate knowledge of all the surrounding circumstances give emphasis to the conclusion that they meant by agreeing "to pay on thirty days' notice," to fix that period as the one when their obligation could be enforced. That the defendant understood the contract to signify this is put beyond all cavil or controversy by the defence he took and successfully availed of when the first bill in equity was filed against him. That bill, as we have already stated, was dismissed at his instance solely because, in the language of his demurrer, "neither the Woodberry Manufacturing Company nor the plaintiffs * * * * claiming by subrogation, had the right to claim and demand anything under the pretended assumpsit or guar-

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anty * * * * nor to bring any suit therefor until after the expiration of the period of thirty days from the date of the service of the notice," given on March the twenty-sixth, 1894. Having asserted in a most formal and unequivocal manner, this to be the true and correct construction of the contract, he now repudiates his own interpretation and relies upon a totally variant and inconsistent one. He was right in the position he took then, and is wrong in the one he assumes now. The agreement to pay on thirty days notice is not an agreement to pay before thirty days have elapsed; nor is it an agreement to pay though no notice be given; but it is, in legal effect, substantially equivalent to a promise to pay on demand after a designated date. In all such instances it has been held that the statute does not begin to run until the demand has been made. *Rhind v. Hyndman*, 54 Md. 530. As, then, by the terms of the guaranty the guarantors could not have been required to pay and could not therefore have been sued for a failure to pay, until after the expiration of a thirty days' notice, it is perfectly manifest that the Statute of Limitations did not begin to run in their favor before that time, however it might have affected the principal debtor. The notice was in fact given on the twenty-sixth day of March, 1894, and expired April the twenty-fifth, and from the latter date the statute began to run. The case of *Little v. Edwards*, 69 Md. 499, is clearly distinguishable from this. That case involved a guaranty given for the guarantor's interest in a judgment long overdue. It was unconditional and absolute, and suit could have been brought upon it immediately after it was given. Because this was so the statute began to run from its date.

But there is still another view of the subject which completely disposes of the Statute of Limitations as a defence. The liability of the guarantor is coextensive with that of the principal, unless it be expressly limited. *2 Pars. on Conts.*, (6th ed.) star page 5; *Richardson v. Allen*, 74 Ga. 719. This, of course, is subject to the qualifications arising

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ing out of coverture and infancy, where the guarantor is held though the principal debtor is not bound at all. *I Chitty on Const.* 738, 739. Now, William J. Hooper's liability continued, and the debt due by him to the Woodberry Company was not barred by the Statute of Limitations when the plaintiffs paid it; and it was consequently not barred at that time as respects the guarantors. When the statute has become a bar to the recovery of a debt, for which several are jointly and severally liable, the promise of one will not remove the bar as to the others; but where one of several so indebted makes a new promise or a payment, either of interest or of a part of the principal before the bar of the statute has attached, this will prevent the statute from running as to the others, even though they be but sureties. Such promise or payment fixes a new date from which the statute begins to run. *Ellicott v. Nichols*, 7 Gill, 86; *Schindel v. Gates*, 46 Md. 604; *Burgoon v. Bixler*, 55 Md. 392. William J. Hooper paid on March the sixth, 1891, the interest due up to February the first of that year, and on February the seventh, 1894, less than three years afterwards, he again made a payment by giving his note, which was accepted and subsequently settled. On April the second, 1894, the plaintiffs, two of the guarantors, paid the debt to the Woodberry Company. There was consequently no point of time from the date of the first item in the account, October the eighth, 1888, till the second of April, 1894, when the Statute of Limitations had become a bar. The debt was during all that period enforceable against the principal debtor, and the liability of the guarantors being co-extensive with his, was equally unaffected by the statute. They had it in their power to guard against a liability lasting so long, had they desired to do so; because it is always competent to a guarantor to limit his liability as to time, amount or parties by the terms of his contract. *Merchants' Nat. B. R. v. Hall*, 83 N. Y. 343. They fixed no limit other than the one heretofore alluded to, and that cannot avail the defendant now. Besides these payments by the prin-

cipal debtor, the plaintiffs, two of the guarantors, who were jointly as well as severally bound with the defendant, continuously recognized and asserted and admitted their liability under the guaranty during the whole period of time covered by it. The debt not having been barred when the plaintiffs paid it, there can be no question of their right to recover contribution from the defendant, because the Statute of Limitations did not begin to run against their demand or claim upon their coguarantor until April the second, 1894. *Bullock v. Campbell*, 9 Gill, 182; *Davies v. Humphries*, 6 M. & W. 153.

Closely allied to the defence we have just considered, is the one of *laches*. Little need be said in regard to it. All of the guarantors knew the financial condition of William J. Hooper when they executed and delivered the guaranty. The record does not disclose that he was at any time during the period covered by the guaranty ever able to pay to the Woodberry Company the amount that he owed it; nor does it show that when the demand was made, in March, 1894, he was less able to settle than he had been previously. Under these conditions a mere delay in making a demand upon him could not have resulted in an injury to the guarantors, because they were placed, by such delay, in no worse position than if demand had been made earlier. Mere prolongation of the time of payment will not discharge a surety or a guarantor. *Benjamin v. Hillard*, 23 How. 149, because, as concisely stated by the late MR. JUSTICE MATHEWS in *Davis v. Wells, Fargo & Co.*, 104 U. S. 159, "both the *laches* of the plaintiff and the loss of the defendant must concur to constitute a defence." It is therefore incumbent on the party relying on this defence to establish the facts which compose it, and hence he must not only show that there has been an unreasonable delay, but further, that an injury or loss consequent thereon has been sustained by him. Not only has that not been done, but the record contains evidence to the effect that at no time since his assignment, in 1886, has William J. Hooper been in a condition to pay his creditors all that he owed.

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We now come to the question respecting the payment by the plaintiffs to the Woodberry Company of the amount for which they and the defendant were responsible under the guaranty. William J. Hooper was indebted to the Woodberry Company. The Woodberry Company was indebted to Theodore Hooper, on April the second, 1894, in a sum amounting to nearly twenty-three thousand dollars, and it was also indebted at the same time to James E. Hooper to an amount exceeding sixty thousand dollars. These sums stood to their credit, respectively, on the books of the company. They could have demanded on that day these amounts in cash. Instead of doing so, they instructed the book-keeper of the company to debit Theodore's account with twenty thousand six hundred and twelve dollars and nine cents, and to debit James E. Hooper's account with the like sum, and the total of these two debits, viz., forty-one thousand two hundred and twenty-four dollars and odd cents, was credited upon William J. Hooper's account. The result of these entries was that William's debt to the Woodberry Company was extinguished to the extent of forty-one thousand two hundred and twenty-four dollars, and the debts of the Woodberry Company to Theodore and to James E. were reduced each twenty thousand and six hundred and twelve dollars. This process as effectually paid the Woodberry Company the amount due to it under the guaranty as though Theodore and James E. had demanded and received from the Woodberry Company checks for forty-one thousand two hundred and twenty-four dollars, and had presented those checks, had them cashed and had then taken the cash and paid it to the Woodberry Company in settlement of William's indebtedness. After these entries had been made, William owed the Woodberry Company nothing on the guaranteed indebtedness, and the Woodberry Company owed Theodore and James each twenty thousand six hundred and twelve dollars less than it had owed them before. Clearly, this transaction resulted in an absolute payment by the plaintiffs of the entire indebtedness covered by the guar-

anty. It was, however, objected that as no cash was in fact used, no payment was in reality made. But it would have been an utterly idle and useless form had checks been drawn and cashed and had the cash been then paid to the Woodberry Company. The money was in bank deposited in the name of William E. Hooper & Sons, in which name the Woodberry Company kept its bank accounts, and could have been drawn out and used, but it would have been redeposited at once, and beyond a few additional entries in the books of the concern, the substantial result would have been ultimately identical. We ought to add that there is nothing in the suggestion that money belonging to the estate of William E. Hooper was included in the sums with which William E. Hooper & Sons were credited in their bank accounts, and on which bank accounts the checks, had they been used at all, would necessarily have been drawn, and the suggestion can be of no avail, because the estate was invariably credited on the books of the Woodberry Company with whatever sums of money were due to it, and the cash itself was all at the disposal of the Woodberry Company for uses of its own.

There is one more question to be considered, and that relates to the appellant's liability to pay to the appellees one-third of the interest paid by them to the Woodberry Company. The sum of forty-one thousand two hundred and twenty-four dollars paid by them includes not only simple but some compound interest. The appellant insists, first, that he is liable, if liable at all, for only one-third of the sum of thirty-five thousand dollars with interest on that one-third from April the second, 1894, the date his co-guarantors paid his share of the obligation for him; and, secondly, that he cannot be held for any compound interest. He is clearly mistaken in assuming that his liability under the guaranty was absolutely limited by the terms of that instrument, to a sum not exceeding thirty-five thousand dollars altogether. The limitation of thirty-five thousand dollars was not a limitation upon the guarantor's ulterior liability to the creditor,

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but it was a restriction of the aggregate amount of the loans and advances to be made by the Woodberry Company to William J. Hooper. For goods sold and money loaned to an amount not exceeding the sum of thirty-five thousand dollars they guaranteed payment to the creditor, but as the guaranty did not provide for an immediate payment, and the guarantors did not contemplate one, it is obvious that their undertaking embraced besides the specified maximum capital sum, the same accessories and consequences (*connexorum et dependentium*) which measured the extent of their principal's liability. *Poth. on Obl.* 404; *Curling v. Chalkier*, 3 M. & Sel. 502; *Benjamin v. Hillard*, 23 How. 149. Now, all of the guarantors, including the appellant, who was treasurer of the creditor company when the debt was contracted and the guaranty was given, knew that it was the invariable and uniform practice of the company to charge up interest on all accounts every four months. He knew that interest was an incident, an accessory and a consequence of every debt due to the company; and therefore, that when the limit of thirty-five thousand dollars for loans and sales would be reached, the debtor would be charged upon that sum with interest in the accustomed way. He contracted with reference to that incident or accessory of the principal's debt, and, like the principal debtor, he is accountable for it. With regard to compound interest there is no difficulty. This is not a proceeding to recover compound interest as a penalty for the breach of a fiduciary duty, as in *Ringgold v. Ringgold*, 1 Har. & G. 79, and *Diffenderffer v. Winder*, 3 G. & J. 311; nor does it belong to the group of cases of which *Rayner v. Bryson*, 29 Md. 480, and *Dennis v. Dennis*, 15 Md. 73, are illustrations; but it is a proceeding involving the doctrine that where the parties to a transaction amongst themselves, treat accrued interest as an augmentation of the original principal sum, and charge up interest thereon, it is unobjectionable, if subsequent lienors without notice are unaffected thereby. In *Fitzhugh v. McPherson*, 3 Gill, 408 our predecessors said: "When interest has once accrued, it

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becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and therefore carry interest." S. C. 9 G. & J. 51. This was affirmed in *Brown v. Hardcastle*, 63 Md. 493, and is fully sanctioned by judicial precedent elsewhere. *Eaton et al. v. Bell et al.*, 5 B. & Ald. 34; *Wilcox v. Howland*, 23 Pick. 167; *Stokely v. Thompson*, 34 Pa. St. 210; *Calhoun v. Marshall*, 61 Ga. 275; 34 Am. Rep. 101; *Vaughn v. Kennan*, 38 Ark. 114; *Wood v. Whisler*, 67 Iowa, 676; 5 *Lawson, Rights, Rem. and Pr.*, sec. 2443; *Muellor v. McGregor*, 28 Oh. St. 265; *Taliaferro v. King*, 9 Dana. 331; *Bledsoe v. Nixon*. 69 N. C. 89; *Pearce v. Hennesy*, 10 R. I. 223; *Pearce v. Rowe*, 1 N. H. 179; *Townsend v. Riley*, 46 N. H. 300; 1 *Am. L. Cases*, 4th ed. 533, notes to *Sellock v. French*. That all the parties agree to this compounding admits of no dispute. Every entry of compound interest made up to July, 1891, was made whilst the defendant was treasurer of the Woodberry Company and whilst he had possession, or at least, control of the books. The plaintiffs have proved the unbroken custom to make such charges, and the defendant has uttered no word of denial. It is simply incredible that the defendant did not know, and did not fully approve of this course of dealing. He was a party to it throughout. His failure to testify in the cause must be treated as an admission of his assent thereto; and his conduct whilst treasurer, in conforming to the uniform custom of making periodical rests, and thus computing interest on interest, not only in respect of this, but with regard to all other accounts, estops him to question its propriety now.

Upon a careful review of the whole record, we have discovered no error whatever, and as a consequence the decree, which required the defendant to make contribution as prayed in the bill, will be affirmed with costs in this Court and in the Court below.

*Decree affirmed with costs above
and below.*

(Decided March 27th, 1895.)

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REBECCA H. KILPATRICK ET AL. *vs.* THE MAYOR
AND CITY COUNCIL OF BALTIMORE.

Condition Subsequent in a Deed.—Conveyance of Land for a Street.—Forfeiture.

A deed will not be construed as being upon a condition subsequent, solely because it contains a clause declaring the purpose for which the land conveyed shall be used, when such purpose will not enure especially to the benefit of the grantor, and when there are no other words indicating an intent that the grant is to be void if the purpose is not carried out.

If it be doubtful whether a clause in a deed is a covenant or a condition subsequent, the disposition of the Courts is to construe the language as creating a covenant or trust rather than a condition.

An ordinance of the Mayor and City Council of Baltimore directed the Comptroller to acquire certain property for public use. This property was a triangular piece of land, vacant and with no streets passing through it. A deed was executed conveying to the city a part of said land in fee, the *habendum* clause containing the words, "as and for a street to be kept as a public highway." All of the land was used by the city for nearly twenty years as a public square and not as a street. If the part of the land conveyed by this deed were used as a street, the rest of the property would be incapable of improvement as a public square, as provided by the ordinance; and no ordinance ever authorized it to be purchased or accepted as and for a street. In an action of ejectment by the grantors in said deed to recover said land, *Held*, that the words in the *habendum* clause did not create a condition subsequent and work a forfeiture of the land to the grantors upon the failure of the grantees to use the same as a public street.

Appeal from a *pro forma* judgment of the Superior Court of Baltimore City for the appellee in an action of ejectment brought by the appellants. The agreed statement of facts showed that the land described in the declaration in this cause is at present a portion or part of Perkins' Spring Square, formerly called Perkins' Spring property, which land, described in the said declaration, is now and has been ever since the 14th January, 1873, used by

the city of Baltimore in connection with the property leased by it on the said 14th January, 1873, as per Exhibit B, as one of the public squares of the defendant, situated within the limits of the city of Baltimore. That the land described in the said declaration, although conveyed to the city on the 11th January, 1873, by deed marked "Exhibit A," has been in the possession and used by the defendant as a portion of said square, adversely, openly and continuously, the said defendant claiming the title and right to use the same as a part of the said square ever since the said 14th January, 1873. That said square, as now used, consists of a triangular piece or parcel of land, including the land described in said declaration, except a small rectangular area of land 95 by 106 feet, which was leased prior to the 16th October, 1872, by the plaintiffs, to certain persons, for building purposes, and which fronted on George street. That said triangular piece or parcel of land, including the land described in the said declaration forming said square, is bounded on the west by Ogston street, on the south by George street, and on the northeast by Myrtle avenue, formerly Chatsworth street, and on the 11th and 14th January, 1873, it was a vacant lot with no street passing through it and no improvements on it. That the land described in said declaration passes from east to west through the northern half of said triangular piece or parcel of land, and since, and a short time after the said 14th January, 1873, has been permanently improved by the defendant by the construction of expensive serpentine cement paved ways, for foot-passengers and travelers, running at oblique angles through said square from Ogston street to Myrtle avenue, with a large mound of earth in the centre of said land described in the declaration, ornamented and embellished with receptacles for flowers. That if the land described in said declaration had been, on the 14th January, 1873, or was now, or heretofore or hereafter, used "as and for a street, to be kept as a public highway," such use would render said triangular piece or parcel of land incapable of improvement as a public square, as provided in the ordinance of 1872.

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Statement of the Case.

The triangular piece of land in question was acquired under a resolution of the City Council passed October 16, 1872, as follows:

"Resolved by the Mayor and City Council of Baltimore, That the City Comptroller be, and he is hereby authorized and directed to lease, for public use, all that portion of the Perkins' Spring property within the following bounds, not leased, on the west side of Ogston street, on the south by George street, and on the northeast by Myrtle avenue, formerly Chatsworth street, at a rate not to exceed four dollars and a half per front foot, for the building lots contained within said bounds, and with the right reserved to purchase at six per cent. capitalized, at the convenience of the city."

The City Comptroller, in compliance with the mandate of said Resolution No. 300, acquired for the city the fee-simple title to the land described in said resolution by the following conveyances, dated and designated as follows: Exhibit A, January 11th, 1873. A deed in fee-simple for a small portion in the northern half of the land which was described in Resolution 300, and being the land which this action of ejectment is brought to recover. This deed in its granting clause or premises conveys a fee-simple estate, and in its *habendum* adds these words, "*as and for a street, to be kept as a public highway.*" Exhibit B, January 14, 1873. A lease for the remainder of the land described in Resolution No. 300. This conveyance leased to the city for ninety-nine years, renewable forever, the land therein described, with the right reserved to purchase the fee at six per cent. Exhibit C, October 31, 1881. A deed in fee-simple for the land leased in "Exhibit B."

The cause was argued before BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

John V. L. Findlay and *Thomas Mackenzie* (with whom were *Harry M. Benzinger* and *James S. Calwell* on the brief), for the appellants.

The conveyance of January 11th, 1873, (Exhibit "A"), was for a special purpose, to-wit, "as and for a street to be kept as a public highway," and that purpose being embodied in the deed as one of its conditions, the Mayor and City Council, had it accepted the deed, must have taken the title subject to the conditions. Generally, persons accepting the terms of deeds must accept the same as a whole, and cannot accept part and reject the rest. *Big. on Estop.*, page 684 and note 4; *Dillon on Mun. Corp.*, section 575. Had the Mayor and City Council condemned this strip of land, an easement would have met the purpose for which it was taken as well as a fee, and it would have acquired, therefore, not an absolute unqualified fee, but only such a use as was consistent with the object for which it was taken. *Dillon on Mun. Corp.*, section 603; *Kane v. M. & C. C.* 15 Md. 249; *Mayor v. Bouldin*, 23 Md. 373. It was, therefore, not necessary for the defendant to have a fee-simple estate, and as it appears from the terms of the deed itself, that there was a condition attached to the grant, it necessarily follows that the intention was not to grant a fee. Vol. 1, Article 21, section 11, P. G. L. (Code 1888); *Hawkins v. Chapman*, 36 Md. 83 (94); *Foos v. Scharf*, 55 Md. 311.

A grantees must use the land in strict conformity with the uses expressed in the deed. And the defendant in this case, having failed to use the land in accordance with the terms of the deed and the conditions contained therein, the plaintiffs are entitled to have and possess the same. *Reed v. Stouffer*, 56 Md. 238; *Second Univ. Church v. Dugan*, 65 Md. 464; *Kelso v. Stigar*, 75 Md. 386; *Heard v. City of Brooklyn*, 60 N. Y. 246.

The decision of this case rests necessarily upon the construction to be placed upon the deed of 11th January, 1873, (Exhibit "A"), more than upon the other branch of the case, and in order to arrive at the true meaning of that deed, let us bear in mind these cardinal principles of construction. 1st. If possible, all parts of a deed must be given their full effect, so that, 2d. The intention of the

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parties may govern and be carried out if possible, and, 3d. Unless there is a clear conflict or repugnancy between the premises and the *habendum* of a deed, the rule which permits the *habendum* to be ignored cannot be applied.

In this case it is clear that the plaintiffs intended to give the strip of land for the purposes of a street, and that it should be opened as a street and kept as a public highway, otherwise, why insert such a provision in the deed or execute the deed three days before the lease? If the plaintiffs had intended that the strip should be used as a park, why was it not included in the lease itself? In the one instance they *gave* it for a public highway without consideration, in the other the city would have paid for it at the rate of \$4.50 per front foot, capitalized at 6 per cent. If such is the intention to be gathered from the deed, then the Court will so construe the deed as to carry that intention into effect. *Matthews v. Ward*, 10 G. & J. 443; *Ware v. Richardson*, 3 Md. 505 (553); *Albert v. Thomas*, 73 Md. 181; *Martindale on Conv.*, page 90, page 101; 23 Me. 217; 70 Pa. 238; 38 N. H. 212 (218); *Flaten v. Moreland*, 19 L. R. A. 195; *Robinson v. R. R.*, 59 Vt. 426; *Winter v. White*, 70 Md. 341; *Handy v. McKim*, 64 Md. 565.

In *2d Univ. So. v. Dugan*, 65 Md. 471, the deeds were somewhat similar in their granting clause to the deed in case at bar, although they included the term "bargain and sell," and only in the *habendum* do we find the use for which the grant is made. Yet here the Court of Appeals construed the two clauses as not inconsistent, and allowed the intention as gathered from the *habendum* to control the construction. As it is contended it should do in this case. The *habendum* describes, limits and defines the estate granted. See *Bouv. Law. Dic.*, title "Deed;" *Am. & Eng. Enc. Law*, 5th vol. page 457. The *habendum* is potent in rebutting any implication arising from silence in the premises as to the *quantum* of estate granted. *Kent*, volume IV, section 67, title, "*Habendum*"; 3 *Wash. R. P.*, page 440. There are no implied covenants in a deed which will be

considered as against the express covenants now. *Glenn v. M. & C. C., etc.*, 67 Md. pages 390-399; *Morris v. Harris*, 9 Gill, page 27.

Thomas G. Hayes, City Counsellor, for the appellee.

The granting clause of "Exhibit A," by the words "do grant unto the Mayor and City Council of Baltimore and its successors," conveys to said city a fee simple estate, and if the words in *habendum*, "as and for a street to be kept as a public highway," are words of condition subsequent, which, if operative and effective would create a base or defeasible fee upon a breach of which a forfeiture and reverter would occur in favor of the grantors, then these words occurring in the *habendum* would create a repugnancy between it and the estate conveyed in the granting clause, and be inoperative in so far as these words limited or diminished the fee simple estate previously granted.

The words "do grant unto the Mayor and City Council of Baltimore and its successors," convey a fee simple estate to the appellee, a corporation aggregate. 1 *Wash. R. P.* sec. 62, page 90; *A. & A. Corp.*, chap. 5, sec. 172; 6 *A. & E. Ency. Law*, 876, "Estates;" *Comyn's Digest Estate A*, 2, 215; 2 *Preston on Estate*, I, *page 7; *Cong. Society v. Stark*, 34 Vt. 243; *Nicol v. N. Y., &c. R. Co.*, 12 N. Y. 121.

The *habendum* of a deed must give way if in conflict with or repugnant to the granting clause of a deed. *Budd v. Brooke*, 3 Gill, 198; *Farquason v. Eichelberger*, 15 Md. 63; *Winter v. Gorsuch*, 51 Md. 186.

The words "as and for a street to be kept as a public highway," occurring in the *habendum*, do not in themselves create a condition subsequent, but are only at best the declaration of a use, a covenant or trust, a breach of which works no forfeiture and reverter in favor of the grantors, but only a liability on the part of the grantee to an action of damages for the misuse or breach of the use, covenant or trust aforesaid. As preliminary to the consideration of the

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question as to whether the words in the *habendum* of "Exhibit A" create a condition subsequent, it may be well to consider certain universally received canons of construction relating to conditions subsequent, which the Courts follow as aids in arriving at a conclusion as to whether any given words create a condition subsequent.

A condition subsequent is never favored, because it works a forfeiture, and forfeitures, both in law and equity, are "odious." 4 *Kent*, 125, 130, 132; *Stanley v. Colt*, 5 Wall. 119; *Passchall v. Passmore*, 15 Pa. St. 295, 307; *Farnham v. Thompson*, 34 Minn. 330; *Brantly's Note to Earle v. Dawes*, 3 Md. Ch. 230.

The mere declaration of the *uses* to which the granted premises are to be applied do not ordinarily import a condition. *Gobert v. Olcott* (Tex.) 23 S. W. Rep., 985; *Packard v. Ames*, 16 Gray, 327; *Rawson v. Uxbridge*, 7 Allen, 129, 130; *Heaston v. Randolph Co. Com.*, 20 Ind. 398.

Where the *use* or *purpose* declared in the deed is not for the special benefit of the grantor, but for the *public at large*, the Courts are not inclined to treat the words as creating a condition subsequent. *Gobert v. Olcott* (Tex.) 23 S. W. Rep. 985; *Packard v. Ames*, 16 Gray, 327; *Rawson v. Uxbridge*, 7 Allen, 129, 130.

Among the many American cases in which words in deeds have been held not to create conditions subsequent, the following may be considered the leading ones, and as will be seen, they establish beyond doubt that the principles of law as stated in all of these cases, forbid that the words "*as and for a street to be kept as a public highway*" could or should be ever held to create a condition subsequent with the incident forfeiture and reverter. In the list it will be seen two Maryland cases are given which follow the principles as announced in the cases given from other States and Federal Courts. *Green v. O'Connor*, 18 R. I. 1, 25 Atl. Rep. 692; *Rawson v. Uxbridge*, 7 Allen, 129 (Mass.); *Packard v. Ames*, 16 Gray, 327 (Mass.); *Thornton v. Trammel*, 39 Ga. 209; *Paschall v. Passmore*, 15 Pa. St. 295;

Laberee v. Carlton, 53 Me. 211; *Gadberry v. Sheppard*, 27 Miss. 203; *Gobert v. Olcott* (Tex.) 23 S. W. Rep. 985; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. Rep. 9; *Summer v. Darnell*, 128 Ind. 38, 13 L. R. A. 173 (note); *Hague v. Ahrens*, 3 U. S. App. 244; *Stanley v. Colt*, 5 Wall. 119; *Stewart v. Redditt*, 3 Md. 71; *Newbold v. Glenn*, 67 Md. 490.

In *Green v. O'Conner*, *supra*, the facts were quite similar to the case at bar. The words in the deed in that case, which were claimed to create a condition subsequent, were: "*This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose.*" The Supreme Court of Rhode Island, in speaking of these words, said: "Nor do we think that the clause quoted created a condition subsequent. Conditions subsequent, as is well understood, are not favored in the law. A deed will not be construed to create an estate on condition unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. If it be *doubtful* whether a clause in a deed be a covenant or a condition, Courts will always lean against the latter construction."

In *Rawson v. Uxbridge*, *supra*, the words claimed to create a condition subsequent, were the following: "*To have and to hold the said given and granted premises with all ye appur'ces, privileges and commodities to the same belonging, or in anywise appertaining to the said town of Uxbridge, forever, to their only proper use, benefit and behoofe for a burying place forever.*" The Court held the above words not to create a condition subsequent.

In *Packard v. Ames*, *supra*, the words used in the deed of a grant of land to a religious society to build a meeting-house, there was in the *habendum* these words: "*Each and every lawful owner and proprietor of a pew or pews in the meeting-house to be built and rebuilt on the said lot of land*

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forever." The Supreme Court of Massachusetts, as to these words, says: "There are no apt or proper words to create a condition. The only words which bear any semblance of an intent to restrict the title conveyed by the deed, are found in the *habendum*. These are merely that the grantees, the proprietors of pews, should hold the estate for the purpose of erecting and maintaining thereon a house for public worship. But we know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be on condition. On the contrary, it has always been held that such a grant does not convey a conditional estate, unless coupled with a clause for the payment of money, or the doing of some act by the grantee on which the grant is clearly made to depend. Without some such clause, a grant for a specific purpose can be held at most only to create a trust, but not an estate on condition."

In *Thornton v. Trammel, supra*, the words construed were: "*It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on the said tract but those which are immediately connected with the Western and Atlantic Railroad.*" It was held that these words did not create a condition subsequent.

In *Paschall v. Passmore, supra*, the words claimed to create a condition subsequent related to a bridge to be kept by us, and was as follows: "Under this condition, nevertheless, that the grantee, in consideration thereof, do, at his and their own cost, erect and always keep in repair a sufficient bridge over the place where the most water shall run, so that the grantees, &c., may at all times commodiously pass and repass over the same with horses and wagons, workmen, tools, &c., for all and every use and purpose whatsoever."

The Court, as to these words, said: "We are thus reduced to the naked inquiry whether the words 'under this

condition, nevertheless,' of themselves create a condition destructive of the interest reserved because of its non-performance? * * I think it is clear, that under the most stringent application of common law principles, no technical condition can be extracted from the language of the deed before us. In the endeavor to ascertain its legal effect, the plaintiff is entitled to the benefit of the maxim which declares condition to defeat an estate *odious*, and that they are to be taken most strictly."

In *Laberee v. Carlton*, *supra*, the words construed in the deed were: "Provided, nevertheless, that if the following conditions and things shall be duly and fully performed by me, the said Miles, that is to say, that whereas, for services had and received by me, the said Miles, and divers good considerations moving me thereunto, if the said Miles shall well and truly find, provide for, maintain and support my father, the said Seth, and my mother, Susan, &c., during their natural lives, &c., then the aforesaid deed shall become void, otherwise, &c." The Court says, in its opinion, as to these words: "It is also a fundamental principle that a condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it. Neither of these requirements appear to be complied with in the deed under consideration."

In *Gadberry v. Sheppard*, *supra*, the consideration was nominal, and the words in deed were: "*The same being for the use and benefit of said town of Benton.*" The Court, in construing these words, said: "These words do not contain any express condition, nor do they import a defeasible estate, and it would be impossible to determine from them what condition was required to be performed."

In *Gobert v. Olcott*, *supra*, a lot of ground was conveyed for a nominal consideration to C. M. Dubois, Bishop of Galveston, as stated in the premises, "*for the benefit of the Roman Catholic Church:*" and in the *habendum* it was pro-

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vided that the land was to be held "unto the said C. M. Dubois, Bishop of Galveston, for the use aforesaid, and to his successors and assigns." The Court, in speaking of these words, said: "We are of the opinion that the grantee took under the deed a fee-simple title in trust for the benefit of the church, whose officer he was. There are no conditions subsequent expressed, and although they may be implied, they are not favored in law."

In the case of *Farnham v. Thompson, supra*, the words claimed to create a condition subsequent, were: "For the purpose of erecting a church thereon only." The Court held that these words did not create a condition subsequent.

In *Hague v. Ahrens*, the words were: "This lease not to be sold, assigned or transferred, without the written consent of the party of the first part." The United States Circuit Court of Appeals, speaking of these words, said: "The law regards conditions with the same disfavor it does forfeitures, and for similar reasons. A clause will not, therefore, be treated as a condition, if it can be construed as a covenant, without violence to its terms. If the purpose to create a condition or conditional limitation is not expressed in clear and unequivocal language, as the Courts have frequently said, in 'apt terms,' such as 'upon condition,' 'provided, nevertheless,' 'so long as,' 'during,' &c., the clause will be treated as a covenant simply. The provision under consideration does not contain such language."

In *Stanley v. Colt, supra*, the words of the will which were claimed to create condition, were: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors to be appointed in manner as hereafter directed.

The Supreme Court of the United States held that these words did not create a condition.

In ascertaining whether the words "as and for a street to

be kept as a public highway" create a condition subsequent, the intention of the grantors is controlling. (a.) The resolution in question. (b.) The incapacity of the appellee to take the land in question for a street, but only for a part of a public square, under the express provisions of said resolution. (c.) The recitals in "Exhibit B" made three days after "Exhibit A." (d.) And all the surrounding facts conclusively show that it was not the intention of the grantors in "Exhibit A," by the use of these words, to create a condition subsequent.

The facts set out in the agreed statement conclusively show a waiver, by appellants, of any forfeiture which might have occurred, by reason of a breach of the condition subsequent (if any such condition existed in the words found in the *habendum*), under "Exhibit A." The facts need not be again repeated in this brief; they show a knowledge and acquiescence for 20 years, less four days, in the use of the land in question, for a part of Perkins' Spring Square, during which time large expenditure of money was made on the very land described in "Exhibit A," in permanent improvements, solely suited to a public square, with the full knowledge of appellants, and no word of warning or objection was ever made by them to the said use, or any claim set up of a misuse or forfeiture, until the institution of this suit of ejectment. This question of waiver of a forfeiture under a condition subsequent has been, in a recent case, ably and fully discussed by the Supreme Court of Oregon. The Court says: "A person will not be allowed to avail himself of a forfeiture of valuable rights, unless he claims it immediately on the happening of the condition upon which it depends. He cannot remain passive in such a case for a long time, after acts have transpired upon which others have relied in matters of importance to them, and then enforce a forfeiture in consequence thereof." *Huston v. Bybee*, 17 Or. 140, 2 L. R. A. 568.

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PAGE, J., delivered the opinion of the Court.

This is an action of ejectment brought by the appellant to recover from the appellee a strip of land running through Perkins' Spring property in the city of Baltimore. The case was heard below upon an agreed statement of facts, and from the *pro forma* judgment thereupon rendered, this appeal is taken.

On the 16th day of October, 1872, the Mayor and City Council of Baltimore passed a resolution authorizing and directing the City Comptroller to lease "*for public use*" all that portion of the Perkins Spring property located within the bounds of Ogston, George and Chatsworth streets, (except a portion theretofore leased) "at a rate not to exceed four dollars and a-half per front foot, for the building lots contained within said bounds," with the right reserved "to purchase at six per cent. capitalized, at the convenience of the city." The land described in this resolution was conveyed to the city in separate parcels, by two deeds dated respectively the eleventh day of January, 1873, and the fourteenth day of January of the same year. These deeds were submitted to and approved by the City Solicitor at the same time, that is to say, on the fourth day of January. By the deed of the fourteenth day of January, the grantors, first having set out the resolution above cited, lease to the city for ninety-nine years, renewable forever, with the right reserved to purchase the fee, all of the ground mentioned in the resolution, except so much thereof as constituted Clark street, which was granted by the deed of the eleventh of January, to the city "*in fee simple*." Clark street, thus referred to, did not in fact exist; it was only the strip of land running from Ogston to Chatsworth street, sixty-feet wide, which the grantors by the deed of the 11th of January had, in consideration of one dollar, granted unto the "Mayor and City Council of Baltimore and its successors," with an *habendum* clause as follows: "To have and to hold the parcel of ground above described, with the appurtenances aforesaid, unto the Mayor and City Council of Baltimore, aforesaid, and its successors

forever, as and for a street to be kept as a public highway." Upon the execution and delivery of these deeds, the city took possession of the property, and since then has used it as a part of Perkins' Spring Square. It has expended large sums of money in improving it, by the construction of expensive paved ways for persons using the square, and of a large mound of earth in the centre, ornamented and embellished with receptacles for flowers.

No ordinance or resolution was ever passed by the Mayor and City Council authorizing the purchase of the land mentioned in the declaration as a public highway, or accepting it as such ; on the contrary, if it should be used as a street, such use would render the triangular parcel incapable of improvement as a public square, as provided by the ordinance or resolution of 1872. It is agreed by the parties that the Court shall draw such inferences of law or fact from the "statement of facts and exhibits as may be right and proper, and all questions of law, as well as inferences that might have been made in the Court below, shall be open for consideration and decision by this Court."

Under these circumstances the appellant contends that the deed of the 11th of January, 1873, was made for the purpose of opening and forever keeping open Clark street, from Ogston to Chatsworth, as a public highway ; that the words, "as and for a street to be kept as a public highway," found in the *habendum*, create a condition, and as the city has failed to use the land in accordance with this condition, a forfeiture has occurred, and the title has reverted to the grantors. To sustain this contention, it obviously is necessary to determine that the words in themselves import a condition, or when taken in connection with the whole deed, that they show a clear and unmistakable intention on the part of the grantor to grant an estate on condition. Technical words are not absolutely essential to create a condition, nor on the other hand does their use necessarily raise one ; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work

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a limitation and condition; and sometimes a covenant or a trust only. *Paschal v. Passmore*, 15 Pa. St. 295; *Bacon v. Huntington*, 14 Conn. 92; *Lessee of Worman v. Teagardue*, 2 Ohio St. 380; *Waters v. Bredin*, 70 Pa. St. 235; *Lessee v. Carlton*, 53 Me. 211.

Conditions subsequent are not favored in law "because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures." 4 *Kent*, 130; *Stanley v. Colt*, 5 Wallace, 119. Therefore it is, that a condition will not be raised by implication, from a mere declaration in the deed, that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. *Packard v. Ames*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio, 358.

And as a further consequence of this rule, it has always been held that "in doubtful cases the disposition of the Courts is to construe language as creating a trust or covenant rather than a condition. See *Earle v. Dawes*, 3 Md. Ch. Rep. 230; *Brantly's note* and authorities there cited; *Scovill v. McMahon*, 62 Conn. 378, 26 At. R. 481; *Greene v. O'Connor*, 18 R. I. 49, 25, At. R. 692; *Rawson v. Inhabitants, &c.*, 7 Allen, 128, 129.

In the elaborate and able opinion delivered in the last cited case by BIGELOW, C. J., the Court said: "If it be doubtful whether a clause in a deed be a covenant or condition, Courts of Law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument." * * "We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used when such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

These principles, which, so far as our researches have gone, seem to be of universal acceptance, are fully sustained by the decisions of this Court. Without undertaking to review the cases in which questions of this nature have been considered, we deem it quite sufficient to refer to the case of *Newbold v. Glenn*, 67 Md. 490, in which JUDGE ROBINSON, speaking for the Court, has succinctly stated the whole law. There, in pursuance of an ordinance of the city the trustees of the McDonogh Educational Fund and Institute, bought of Wolfarden, a lot of ground as a site for the proposed McDonogh Institute. The deed recited the ordinance and conveyed the property to the city "in trust for the uses and purposes, and subject to the trusts, limitations, powers and provisions imposed, expressed and declared in and by the ordinance." Subsequently the city sold the property to William W. Glenn, and bought another, on which the buildings were erected. One of the questions involved was whether the city acquired an indefeasible fee-simple title or only a fee on condition subsequent that the property was to be used as a site for the institute, and on failure so to use it, there was a reverter to the grantor. It was held, however, the words relied on to establish the condition were used only "for showing the purpose for which the property was bought and the character in which it was held, and not for the purpose of limiting the right of alienation." It was also held there was nothing "to justify the inference that the property was sold or conveyed on condition that it was to be used as a site for the McDonogh Institute, and on failure thus to use it, the title was to revert to the vendor, * * * * and if such had been the intention, we must presume that it would have been expressed in clear and explicit terms, or in terms at least from which such intention could be fairly inferred." The Court also distinguished that case from those of *Reed, Howard et al. v. Stouffer*, 56 Md. 236, and of the *Second Univ. Soc. v. Dugan*, 65 Md. 460, in which it was held "on the express terms of the grant and the incapacity of the grantee to take

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upon any other conditions ; that upon the failure to use the property for the purposes in consideration of which it was conveyed, the title reverted to the grantor."

Applying these principles to the case at bar, we cannot find anything in the deed of the eleventh of January to justify the inference that the property was conveyed on condition that it was to be used as a public highway, and "on failure thus to use it, the title was to revert to the vendor." In the granting clause the property is conveyed absolutely to the city, and in the *habendum* are the words, "to have and to hold, &c., as and for a street to be kept as a public highway." These words do not *ex proprio vigore* import a condition, nor are they so connected with the grant itself, as in any manner to qualify the general terms there employed; and there is no such language to be found in the deed, from which, when the context is taken into consideration, an intention to create a condition can be inferred. The lot was acquired by the city under the authority of a resolution, which directed a lease "for public use," with the right reserved to purchase. It was part of the property included within what was called "the Perkins' Spring property;" and inasmuch as the whole of the property was immediately upon its acquisition, devoted by the city to the uses of a public square, it may reasonably be presumed that such was the "public use" had in view when the resolution was passed. Under these circumstances it is inconceivable, and it would require the plainest terms to enable us to determine that it was the intent of the deed that if the property was put to the public use contemplated by the resolution, and not to the use of a public street, the city should lose its title, and the property revert to the grantors. A glance at the plat, with which we have been furnished, will satisfy anyone that to use this parcel of land as a street would be profitless, both to the grantors and the public ; and it is agreed by the parties, that such use would render the property included in the resolution "incapable of improvement as a public square, as provided in the ordinance of 1872."

We are disposed to place but little importance upon the fact, that the consideration in the deed is merely nominal. The whole of the Perkins' Spring property (except a portion thereof) was transferred to the city by the same parties. The resolution authorized a lease at \$4.50 per front foot of the building lots contained. Prior to the passage of the resolution Clarke street did not exist. It is obvious, that if Clarke street be taken into account, more front feet can be obtained than there would otherwise be possible, and thus a larger price could be realized for the entire property. The transfer to the city of the Spring property, although accomplished by two deeds, ought to be regarded as one transaction, and the real consideration for the conveyances must be taken to be the aggregate amounts received from the entire property. In view of all the facts of the case, and the terms of the deed, we think the words relied on to create the condition are quite as consistent with an intent to repose a confidence in the authorities of the city, that they "would fulfil the purpose of the grant, so long as it was reasonable and practicable so to do, as they are with an intent to impose a condition which should compel it, on pain of forfeiture, to maintain the property as a public street, however inconvenient, impracticable or worthless it might become, either to the vendor or vendee." "Language so equivocal cannot be construed as a condition subsequent, without disregarding the cardinal principle of real property * * * that conditions subsequent, which defeat an estate are not to be favored or raised by inference or implication."

Rawson v. Inhabitants, &c., supra, 131.

From what we have said it follows that the judgment of the Court below must be affirmed.

Judgment Affirmed.

(Decided March 27th, 1895.)

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Statement of the Case.

WILLIAM W. BOYCE ET AL. *vs.* WILLIAM N.
WORLEY.*Implied Contract.*

Where services are rendered by one party for another, without any express agreement as to his compensation, he is entitled to be paid the fair value of such services.

Appeal from an order of the Circuit Court of Baltimore City. The executors of James Boyce filed a bill for the administration of the estate in the said Circuit Court, and in the course of the administration Auditor's Accounts were stated, allowing the sum of \$1,240 to the appellee, Worley, for salary as clerk to the executors, at the rate of \$40 per month, from September 1, 1891, to April 1, 1894. To this allowance the appellants excepted and appealed from the order of the Court below (DENNIS, J.), overruling their exceptions. The appellee's evidence showed that John A. Boyce, one of the executors, suggested to ex-Judge Wm. A. Fisher, another of the executors (Wm. W. Boyce being the third), \$100 a year as a proper salary for Mr. Worley for keeping the books for the estate. To this proposition Judge Fisher refused to agree, and nothing more was done in reference to the matter at that time. Judge Fisher could not recollect where or when this conversation took place or whether Wm. W. Boyce was then present. About four months afterwards Worley spoke to Judge Fisher in reference to his salary, and was told that he had better say nothing about it just then, but that he should go on with the work, and when an account was stated, he would be allowed what his services were reasonably worth. This was the testimony of Judge Fisher. An expert bookkeeper proved the amount allowed was most reasonable. The appellee himself proved that Judge Fisher told him he would

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get what his services were worth, and that, on an occasion prior thereto, while he was sitting at his desk in the office of the Franklin Coal Co., John A. Boyce entered the room and walking up and down the floor, at some distance from his desk, declared that *he* did not propose to pay more than \$100 per year for keeping the estate's books. Appellee did not consider that John Boyce was speaking to him, and determined to pay no attention to this remark. Subsequently he spoke to Judge Fisher, whom he regarded as the principal executor, and as above stated, was told he would receive "what his services were worth." John Boyce and his brother William testified that they went to Mr. Worley and said to him: "Mr. Worley, we have determined, that your salary for keeping the books of the estate shall be \$100 per year," and that Worley made no reply.

The cause was argued before ROBINSON, C. J., BRYAN McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Vernon Cook (with whom were *Gans & Haman* on the brief), for the appellants.

Wm. S. Bryan, Jr. (with whom was *E. N. Rich* on the brief), for the appellee.

ROBINSON, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Court below overruling exceptions to the Auditor's Account in the estate of James Boyce, deceased, allowing the appellee forty dollars a month for services rendered by him as clerk to the executors.

The question turns upon whether these services were rendered under an agreement with the executors, by which the appellee was to be paid one hundred dollars a year, or under an agreement by which he was to be paid a fair and reasonable compensation for such services.

If the case rested upon the testimony of John A. Boyce

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and W. W. Boyce, two of the executors, it might be fairly inferred that the services were rendered by the appellee under an agreement express or implied, by which he was to be paid one hundred a year. The appellee, however, denies that there was any such agreement or understanding, and Judge Fisher, the other executor, testifies that when the appellee inquired of him as to what he was to be paid for his services, he, the witness, told the appellee to go on with the work, and he should be paid what his services were fairly and reasonably worth.

The proof shows that the services rendered by the appellee were fairly and reasonably worth forty dollars per month. And in view of this conflict in the testimony, it can hardly be said that the exceptants have satisfactorily established an agreement between them and the appellee, by which the latter was to be paid one hundred dollars a year. We agree therefore with the Court below, that the appellee is entitled to a fair and reasonable compensation for his services.

Order affirmed.

(Decided March 27th, 1895.)

THE HOME LIFE INSURANCE COMPANY *vs.*
KATE SELIG, OTHERWISE KNOWN AS KATE HOH-
MAN ET AL.

Injunction to Restrain Action at Law on Policy of Insurance.—Concurrent Jurisdiction.

An injunction will not be granted to restrain the prosecution of an action at law on policies of life insurance by an assignee thereof, upon the ground that the policies and the assignment and assent thereto of the insurer had been procured by fraud, since that question can be determined in the action at law.

After an action at law on a policy of life insurance had been instituted by an assignee thereof, and pleas were filed alleging fraud in procuring the policy and in the assignment, the defendant filed a bill in equity alleging that the policy and the assignment, etc., had been obtained by fraud, and asking that the plaintiff in the action be restrained from further prosecuting the same, and for a cancellation of the policy if fraudulent, and if not, then for a determination of the question of the ownership of the proceeds. *Held*, that the bill should be dismissed because these questions could be tried in the action at law, and also because if a Court of Equity had concurrent jurisdiction in the premises, yet the Court of Law, having first assumed control of the subject-matter, was entitled to retain it.

When the jurisdiction of a Court of Law is concurrent with that of a Court of Equity, the Court which first exercises jurisdiction is, as a general rule, entitled to retain exclusive control of the issues.

Appeal from a decree of the Circuit Court No. 2, of Baltimore City (WICKES, J.), as follows: "This case having been originally set down for a hearing on the application of the plaintiff for an injunction to restrain the defendant, Katharine Hohman, from further prosecution of her suits at law, on the policies of life insurance mentioned in the pleadings, and to have this Court take jurisdiction in the premises, and the Court not having time for full consideration of the case before the said suits would come on for trial in the Superior Court, where they were pending, and

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yet having sufficient doubt as to its duty in the premises, as to justify it in passing an order temporarily restraining further proceedings in the said suits, and with this view having signed the order passed in the case for an injunction, which was intended to be temporary, but by mistake was made in form absolute, and the Court having had in the meantime a full opportunity to consider the said application, after full argument by the solicitors of the respective parties, and having reached the conclusion that it has no jurisdiction in the premises, it is, this 16th day of November, 1894, adjudged, ordered and decreed, that the said application for an injunction be refused, and that the injunction ordered be rescinded and the bill be dismissed with costs to the defendant."

The cause was argued before BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Frank Gosnell (with whom was *James W. McElroy* on the brief), for the appellant.

Numerous grounds for the interposition of a Court of Equity exist in this case, which may be stated thus: 1. The two policies sued upon were procured by fraud and false representations. 2. The assignments of the policies were procured by fraud, and are without consideration to support them, evidence as to which latter fact *cannot be offered in a Court of Law*. 3. The appellant is entitled to have the policies and the assignments delivered up for cancellation, *which can only be accomplished in a Court of Equity*. 4. The assgnee having brought separate actions, the trial of one will not determine the other, and in the event of either or both being decided at law against the appellant, resort will have to be had to this Court by bill of interpleader, to determine to whom, among the several appellees, the money is properly payable. 5. Should the assignments be stricken down for fraud in the action at Court, appellant would still have to defend other suits upon the

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policies brought by the executors, under such one of the wills of Hancock as may be determined to be valid. The existence of the caveat proceedings alone is a sufficient ground for this Court to entertain jurisdiction. 6. The assignee of the policies is not a fit person to prosecute actions upon them for the benefit of whom it might concern, particularly in view of the fact of the charges made against her by the appellant and by her co-appellees. There is a "trust" created in express terms by the assignments, and, in the event of a recovery upon the policies, resort to this Court would be necessary to enforce the trust.

Counsel relied on the following authorities: *Webster v. Hardesty*, 28 Md. 596; *Boyce's Executors v. Grundy*, 3 Pet. 215; *Oelrichs v. Spain*, 15 Wall. 228; *Preteca v. Mexican Land Grant Co.*, 4 U. S. App. 330; *Clements v. Macheboeuf et al.*, 92 U. S. 418; 1 *Story Equity*, section 33; *Insurance Co. v. Baily*, 13 Wall. 621; *Kilbourn v. Sunderland*, 130 U. S. 514, 515; *Taylor v. Savage*, 143 U. S. 95; *Delaware, &c., Co. v. Gillett*, 54 Md. 221; *Phelps Juridical Equity*, sec. 230; *Wagner v. Shank*, 59 Md. 326; *Dennison v. Yost*, 61 Md. 141; *Insnrance Co. v. Fletcher*, 117 U. S. 529; *The British Equitable Ins. Co. v. The Great Western Ry. Co.*, 38 L. J. Ch. (N. S.) 132; affirmed in 38 L. J. Ch. (N. S.) 316; *Watson v. Alcock*, 4 De G. M. & G. 242, 248; affirmed in 1 Smale & Giffard, 319; *The India and London Assurance Co. v. Dalby*, 4 De G. & Sm. 462; *Metler v. Metler, Admx.*, 3 C. E. Green, 270; affirmed in 4 C. E. Green, 457; *Vanderwelden v. Chicago, &c., Ry. Co.*, 61 Fed. Rep. 58; *Key v. Knott*, 9 G. & J. 360; *Lucas v. Byrne*, 35 Md. 496; *Clarke v. Lancaster's Lessee*, 36 Md. 203; *Bispham's Equity*, 459; *Hartshorn v. Day*, 19 How. 212; *George v. Taft*, 102 U. S. 564; *Crapley v. Vogeler*, 2 App. Cas. D. C. 28; *Tourney v. Ry. Co.*, 3 C. B. (N. S.) 150.

John V. L. Findlay and *Thomas Mackenzie* for the appellee, Selig, cited: *Grand Chute v. Winegar*, 15 Wall. 373;

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Phoenix, &c., Co., v. Bailey, 13 Wall. 616; *Foley v. Hill*, 2 H. of L. Cas. 28; *Fire Ins. Co. v. Delavon*, 8 Paige, 422; *Alexander v. Muirhead*, 8 DeSaus. 162; 3 *Pomeroy Eq.*, sec. 1363; 2 *Story Eq. Jur.*, sec. 828; *Fellows v. Spalding*, 141 Mass. 92; *Tribbette v. Illinois, &c., Co.*, 19 L. R. A. 660; *Johnson v. Glenn*, 40 Md. 200; *Union Bank v. Poultney*, 8 G. & J. 324; *Reddall v. Bryan*, 14 Md. 476; *Canton Co. v. N. C. R. W. Co.*, 21 Md. 398; *Shoemaker v. Nat. Mec. Bank*, 31 Md. 398; *Lamm v. Burrell*, 69 Md. 274.

BRISCOE, J., delivered the opinion of the Court.

This appeal is from an order of the Circuit Court No. 2, of Baltimore City, passed on the 16th of November, 1894, "refusing an application for an injunction and rescinding an order passed on the 11th day of June of the same year, for an injunction and dismissing the bill with costs." It will be observed that the proceedings were somewhat irregular, but the reasons therefor are stated by the learned Judge below in the order itself. And inasmuch as the bill upon its face did not disclose a case for the jurisdiction of a Court of Equity, and was dismissed upon final hearing, no injury was done the plaintiff thereby.

The material allegations of the bill may be thus stated: The appellant, The Home Life Insurance Company of New York State, issued to a Mr. Hancock two policies of insurance upon his life, one dated the 11th day of November, 1892, for three thousand dollars, and the other dated the 21st day of December of the same year, for the sum of two thousand dollars. These policies were subsequently assigned, with the assent of the company, to Katherine Hohman, one of the appellees, in trust for certain purposes specifically set forth in the assignments. And subsequently, by a codicil dated the 6th of May, 1893, to his will, Hancock directs the entire proceeds of these two policies to be paid by his executors to Katherine Hohman. This will and codicil have been caveated by the testator's sisters, who

claim under a will made by Hancock prior in date to the will bearing date on the 15th of January, 1892, and these issues are now pending for trial in one of the Courts of Baltimore City. And the bill further avers, that suits at law were begun on the 6th of September, 1893, by the appellee Hohman against the insurance company for the recovery of the money mentioned in said policies. It then charges that the two policies and the assent of the company were obtained by fraud, and that the assignments were also fraudulently procured and are without consideration. And upon the facts as thus disclosed, relief by injunction was asked to restrain the actions at law, to decree a cancellation of the policies, and also, if they be valid and subsisting obligations, then to determine to whom the proceeds are payable.

There was no testimony taken, but the case was submitted on the bill, the answer and certain exhibits. It is well settled by this Court, and it has been held by the Supreme Court, "that whenever a Court of Law, competent to take cognizance of a right, has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a Court of Equity, the plaintiff must in general proceed at law, because the defendant under such circumstances has a right to trial by jury." *Phoenix Mutual Life Insurance Company v. Bailey*, 13 Wall. 616. And the authorities are abundant to prove the right to have a question of fraud adjudicated at law. *Nat. Park Bank v. Lanahan, trustee*, 60 Md. 514.

Now, upon this case, as presented, it seems clear to us that the remedy at law is certain and adequate, as practical and efficient to the ends of justice as the remedy here sought. The plaintiff here, but the defendant in the suits below, duly appeared to the actions at law, and the pleas filed by it present the material defences relied upon in the suit in equity.

But apart from this, it is clearly established in cases of concurrent jurisdictions, that the Court which has first as-

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sumed control over the subject-matter of controversy ought to be entitled to retain it. Here it appears that the actions at law were brought to the September term, 1893, of the Superior Court of Baltimore City, and the pleadings made up and the cases specially set for trial on the 4th of June, 1894, by agreement. Four days afterwards, to-wit, on the 8th of June, the plaintiff filed this bill. Mr. Pomeroy, in cases involving questions similar to those here, thus lays down the rule: "Where the jurisdiction is concurrent, or, in other words, where the interest and primary rights of the parties are legal, and the only question between the two Courts relates to the adequacy of their respective remedies, as a general rule the tribunal which first exercises jurisdiction is entitled, or, at least, permitted to retain an exclusive control of the issues. It is therefore a well settled doctrine, that in cases of this kind, where the primary rights of both parties are legal and Courts of Law will grant their remedies, and Courts of Equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, provided the legal remedy will be adequate, that is, provided the judgment at law will do full justice between the parties and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test." *Pomeroy's Equity Jurisprudence*, vol. 111, section 1363.

Manifestly in this case a judgment for the insurance company in the actions at law would not only satisfy the ends of justice, if the life policies were fraudulently procured, but would be a full settlement of this controversy. The cases relied upon by the appellant, in support of its contention, are clearly distinguishable from this, and are not applicable here.

We are therefore of the opinion that the plaintiff is not entitled to the relief asked for under its bill, so the order of the Court below appealed from will be affirmed with costs.

(Decided March 27th, 1895.)

Order affirmed with costs.

MARY DeCHARMES GARRISON ET AL. *vs.* THOMAS HILL, EXECUTOR, ET AL.

Jurisdiction of Equity to Enforce Distribution of an Estate by the Executor—Accounts Passed in the Orphans' Court—Delay by Executor—Death of Legatee before that of Testator—Costs.

Where the person to whom property is bequeathed under a will dies before the testator, such property passes to the next of kin of the legatee who are living at the death of the testator.

Where an executor refuses to pay over the money in his hands to a person claiming the same as distributee until the right of such person to receive it is established, equity has jurisdiction to grant relief upon a bill by the distributee against the executor.

When a Court of Equity superintends the settlement of the personal estate of a decedent, the accounts of the executor, already settled in the Orphans' Court, should not be disturbed, unless they are clearly shown to be erroneous. Clear evidence of guilty knowledge, fraud or collusion should be produced to justify the Court of Equity in holding an executor responsible for a claim against the estate paid by him after it has been passed by the Orphans' Court.

If an executor unnecessarily delays the settlement and distribution of the estate, keeps the funds thereof in his individual account in bank, and uses the same for his own purposes, he should be required to pay interest on the same.

Where the decree of the Court of Appeals reverses the decree below, remands the cause for further proceedings, and directs the costs to be paid by the appellee individually, this includes all costs in the Court of Appeals and the Court below, while such costs as are incurred after the cause is remanded, will abide the final result.

Appeal from a decree of the Circuit Court of Baltimore City (DENNIS, J.), dismissing the plaintiffs' bill of complaint. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., McSHERRY FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Hyland P. Stewart, for the appellants.

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Thomas Ireland Elliott, for the appellees.

Boyd, J., delivered the opinion of the Court.

On May the 10th, 1892, the appellants filed their bill of complaint in the Circuit Court of Baltimore City against Thomas Hill, individually and as executor of Maria M. Johnson, as executor of Emma M. C. Johnson, as administrator *c. t. a.* of Maria E. Weise, and as administrator *c. t. a.* of W. W. Johnson. On May the 13th, 1892, on a petition filed by the plaintiffs, leave was granted to make the trustees of the Seventh Baptist Church of Baltimore, Samuel E. Hill and Thomas Hill, trustee under the will of Maria E. Weise, defendants, which was accordingly done.

The bill alleges that Mary De Charmes Garrison, one of the plaintiffs, is the only heir at law and the next of kin of Maria M. Johnson, claims certain interests in the estates of Maria E. Weise and others in charge of Thomas Hill, and prays the Court (1) to take jurisdiction in the premises; (2), to construe the wills and determine the rights of the plaintiffs; (3), to require Thomas Hill, as executor of Emma M. C. Johnson, to account for the rents and profits of the real estate, for the overpayments by him of the collateral inheritance tax from the estate of Emma M. C. Johnson, for the excessive wages paid to an alleged nurse from said Emma's estate, and for the extra commissions claimed on the rents collected from the real estate; (4), to require Thomas Hill, as executor of Maria M. Johnson and of Emma M. C. Johnson, to pay over the money in his hands belonging to the plaintiffs; (5), to restrain Thomas Hill from interferring with the real estate, and collecting the rents therefrom; (6), asks for the appointment of a receiver *pendente lite*, and then concludes with a prayer for general relief.

It alleges that Thomas Hill had paid and settled all the debts due by the estate of Emma M. C. Johnson, as shown by his account filed in the Orphans' Court, and has refused to deliver possession of the balance of the estate over to the plaintiffs, though often requested so to do, etc.

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On June the 16th, 1892, Thomas Hill filed his answer as executor of Maria E. Weise, Maria M. Johnson and Emma M. C. Johnson, as administrator of W. W. Johnson, and individually. Amongst other things he admits that he is collecting the rents of the real estate mentioned in the bill of complaint ; that he holds in his possession the residue of the personal estate of Emma M. C. Johnson, remaining after the settlement of her estate, and that he has refused to deliver the real estate and personal property to complainants. The answer also alleges that the respondent had filed in the Circuit Court for Baltimore City a bill asking the Court to assume jurisdiction over the settlement of the estate of Emma M. C. Johnson, prior to the filing of the bill in this case, as was well known to the complainant's solicitor. On the 19th of September, 1892, he obtained leave to withdraw his answer and demur. He filed a demurrer alleging that the Court had assumed jurisdiction of the same subject-matter in a cause wherein all the parties to this cause had been joined. On February the 7th, 1893, the demurrer was overruled, and on the 13th of the same month a plea was filed by the permission of the Court, which practically raised the same question as the demurrer. On February the 16th, 1893, the Court passed an order adjudging the plea insufficient in law, and giving the defendant ten days to answer the bill. On March the 17th, 1893, a decree *pro confesso* was passed against Thomas Hill, and on the 24th of that month he prayed an appeal to this Court from the order overruling his plea. On May the 8th, 1893, a certified copy of the order of this Court dismissing that appeal was filed, and on May the 10th an agreement of solicitors to strike out the decree *pro confesso* was filed, and an order of Court passed striking out said decree, granting him leave to file his answer, and the answer was filed the same day. By it he admits that he has refused to surrender either the real or the personal property to the complainants, pending a decision as to the parties properly entitled to the same in a case already instituted by himself and still in

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existence. A general replication was filed and leave granted to take testimony on September 6th, 1893. Testimony was commenced October 26th, 1893, and returned March the 5th, 1894. In the meantime the title to the real estate had been determined by ejectment suits, one of which was in this Court at the January term 1894.

The case referred to in the pleadings of the defendant, Thomas Hill, as pending, was instituted on May the 10th, 1892, the same day that this one was by Eliza P. Johnson and husband, Thomas Hill, executor of Emma M. C. Johnson and Thomas Hill, trustee under the will of Maria E. Weise, against the trustees of the Seventh Baptist Church of Baltimore, Mary Garrison, Thomas Garrison, her husband, and others. That bill prayed the Court to assume jurisdiction over the personal estate of the said Emma M. C. Johnson, asked that a decree be passed for the sale of the real estate mentioned in the bill, and for further relief. On August 9th, 1892, a demurrer was filed to the bill by Mr. and Mrs. Garrison, and on December the 19th, 1892, the Court sustained the demurrer with leave to the plaintiffs to amend, within ten days, by striking out all except so much as covered the case made by the executors in asking for a construction of the will and the administration by that Court of the assets remaining in his hands. On January 9th, 1893, the plaintiffs having failed to amend within the time fixed by the Court, a decree was passed dismissing the bill of complaint. An agreement of solicitors having been filed, an order of Court was passed February 4th, 1893, striking out the decree of January 9th, 1893, and extending the time for filing an amended bill to three days from the date of the order. On February the 6th, 1893, an amended bill was filed. It omits the prayer for the sale of the real estate, asks the Court to assume jurisdiction over the distribution of the personal estate of Emma M. C. Johnson, to construe the will of Maria E. Weise, Maria M. Johnson, Emma M. C. Johnson, and determine who are entitled to the personality by reason of said wills or otherwise, and then

contains a prayer for general relief. Since the amended bill was filed, the plaintiffs in that case, so far as disclosed by this record, seem to have done but little, if anything, towards bringing the case to a hearing and distributing the estate.

We have thus referred in detail to a number of dates upon which pleadings were filed, disposed of, etc., as we believe they materially reflect upon the question as to whether the executor has used such diligence in endeavoring to settle the estate of Emma M. C Johnson, as the law requires of him, which is relevant to some of the matters hereinafter referred to.

This case was finally heard, and on December 19th, 1894, a decree was passed dismissing the bill with costs. In the decree it is stated that the Court is of the opinion that neither as a matter of law nor of fact are the plaintiffs entitled to relief in the premises. The reasons for such opinion are not given.

We do not see any difficulty in granting the plaintiffs relief under this bill. Which suit was first instituted, is by no means clearly shown, and it is doubtful whether it could be, as the bills were filed the same day. The demurrer and plea of Thomas Hill, by which he undertook to set up the defence of a pending suit, were overruled and apparently that line of defence was decided against him. The bill in the case brought by him was determined on demurrer to be insufficient in law, and in fact the Court passed a decree dismissing his bill as late as January, 1893, although the case was subsequently reinstated. The amended bill filed by him involves a number of matters which were calculated to embarrass and delay the determination of the question which the plaintiffs in this case are interested in having speedily settled. Some persons have been made parties to the suit instituted by Mr. Hill who can have no possible interest in the controversy between these plaintiffs and him, as executor of Emma M. C. Johnson. If it be determined that Mrs. Garrison is, as the only surviving niece of Maria M. John-

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son, entitled to the personal estate of Emma M. C. Johnson, then nothing remains to be done but to ascertain how much Mr. Hill, as her executor, is chargeable with and require him to pay it over. That Mrs. Garrison is so entitled has not been seriously questioned in this Court, and there would seem to be no room for any controversy about it. Emma M. C. Johnson died April 22nd, 1891, leaving a will by which she gave everything to her mother, Maria M. Johnson, who died January 31st, 1889. Inasmuch as Maria M. was dead when the testatrix died, the personal property bequeathed to her passed to her next of kin living at the death of the testatrix. *Glenn v. Belt*, 7 G. & J. 362; *Wallace v. DuBois*, 65 Md. 153; *Halsey v. Convention of Protestant Church*, 75 Md. 275. The evidence shows that Mrs. Garrison was the only living child of a brother or sister, and was the next of kin of Maria M. Johnson. Grand nephews and grand nieces are not entitled to share in the distribution. *McComas v. Amos*, 29 Md. 120. So we see that Mrs. Garrison is entitled to the personal estate of Emma M. C. Johnson, and we know of no reason why this could not have been determined, so as to protect the executor, several years ago.

It being alleged in the bill and admitted in the answer that the executor refused to pay over to Mrs. Garrison the balance in his hands, a Court of Equity can give her relief, especially under such circumstances as those in this case. *Alexander v. Leakin*, 72 Md. 199. It is but just to the executor that the right of the appellant to the distribution be fully and properly established. This can be done in a Court of Equity better than in the Orphans' Court. Then, as he refuses to pay over the distribution to the appellants until they establish the fact that Mrs. Garrison is entitled to it, the Orphans' Court could not furnish them all the relief they were entitled to. But it is not denied that a Court of Equity has jurisdiction in such cases. On the contrary, the executor himself has asked the aid of that Court.

It only remains for us to determine what relief the appellants are entitled to. We do not think the executor should

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be charged with the amount paid Mrs. Micheau by him for services alleged to have been rendered by her. Her account was regularly passed by the Orphans' Court, and when the executor settled his account he was allowed the amount of the claim which he had paid to her. The evidence wholly fails to show collusion between the executor and Mrs. Micheau, or any such knowledge of the incorrectness of the claim as would justify us in charging him with it. If we were called upon to determine whether the account was a proper one, we would hesitate to reject it under all the evidence in this case, but we need not pass upon that question. If Mr. Hill can be required to repay to the estate the amount of that account, no executor or administrator would be safe in paying debts proven in the Orphans' Court. When a Court of Equity does take charge of a personal estate, it has no right or authority to disturb accounts already settled in the Orphans' Court, unless they are clearly shown to be erroneous, and it should always be inclined to protect and uphold, as far as possible, the *bona fide* acts of an executor or administrator done in that Court, as under the laws of this State it has been especially established for the settlement of estates of deceased persons. The system providing for the settlement of accounts, etc., in that Court does not afford such protection to an administrator or executor as should be given to them, and Courts of Equity must not unnecessarily increase the risks and liabilities assumed by them. Clear and unequivocal evidence of guilty knowledge, fraud or collusion should be produced to justify a Court in holding an executor responsible for a claim paid by him after it had been *passed* by an Orphans' Court. We think, therefore, the executor should be credited with the amount paid by him to Mrs. Micheau when his account is stated.

As to the claim that the executor should be charged with interest, the bill does not claim interest, and there is nothing to show that the executor had notice that it would be claimed. There have been so many cases and so much contention between these parties that we do not feel justified in direct-

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ing interest to be charged against the executor without some more definite evidence of default on his part. The record dose not disclose such diligence on the part of Mr. Hill in securing a settlement of the estate as there should be by an executor. When he settled his account in the Orphans' Court, nearly three years ago, he had a balance of \$6,123.56 in his hands for distribution, and although he has probably paid out about one-half of that amount on account of rents improperly charged in his account, there would still be in his hands probably three thousand dollars or more of that money, without taking into consideration any other sums that the appellants claim he is chargeable with. His own evidence shows that he has kept this in his individual account in bank. If he has used it for his own purposes, he should be required to pay interest on it, especially if he has unnecessarily delayed the settlement of the estate. As there are a number of other items with which the appellants seek to charge the executor, this cause should be referred to the Auditor to state an account from the testimony now in the case, and such additional evidence as either party may desire to take if the Court below deems it necessary and proper. We do not think it necessary or proper to pass upon all those items. Some of them cannot well be determined in the present condition of the record, as the evidence is too indefinite and meagre to enable us to reach an intelligent conclusion concerning them. We can see nothing connected with the settlement of this estate which required so much litigation, expense and delay, and the Court below should require the case to be concluded without any unnecessary delay.

It follows from what we have said that the decree must be reversed and the case remanded in order that an account may be stated in accordance with this opinion.

Decree reversed and cause remanded.

*Costs to be paid by Thomas Hill
individually.*

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A motion for a reargument was subsequently made by the appellees, and in disposing of this motion,

BOYD, J., delivered the opinion of the Court.

The motion for a reargument in this case, upon the question of the payment of the costs, must be overruled. We directed Thomas Hill to pay the costs individually, because the appellant is the only person entitled to the distribution of the estate of Maria M. Johnson, and if the costs were paid out of the fund held by the executor, it would be equivalent to requiring the appellant to pay them. We do not deem it necessary to discuss the several reasons argued in support of the motion. We gave the matter full consideration before passing the decree, and are of the opinion now, as we were then, that the facts disclosed by the record fully justify the disposition of the costs made by us. The inquiry has been made as to what costs are included. The decree directs the costs to be paid by Thomas Hill individually. That includes all costs in this Court and the Court below. Of course, such costs as are incurred after this cause is remanded must abide the final result of the case.

(Filed April 19th, 1895.)

Md.]

Syllabus.

ALEXANDER SHAW AND CHRISTIAN DEVRIES,
EXECUTORS OF J. S. COMBS ET AL., *vs.* ALTHEA
M. DEVECMON ET AL.

Duty of Person Taking Possession of an Infant's Land.

A person who takes possession of the land of infants, managing the same for their benefit, is not entitled to an allowance for money expended by him in the purchase of an outstanding claim against the estate, not shown to be necessary, without the consent of the beneficiaries, then of age.

Certain land sold at a tax sale was conveyed to the widow and infant children of the purchaser, who died after the sale. An uncle of the children took possession of the land for the grantees, receiving the rents and profits, and a claim to the land having been set up by the former owner, the uncle bought the title of such owner, and had the same conveyed to himself. Upon his books, the children were credited with the rents, etc., and charged with the sum paid for the said title. The children were of age at the time of this purchase, but their consent to the same was not obtained. After the death of the uncle a bill was filed against his executors and devisees, asking among other things for an account of the rents, etc. *Held*, that no charge should be made against said children for the sum so expended in the extinguishment of the outstanding title.

Appeal from a decree of the Circuit Court for Allegany County (STAKE, J.), ratifying one Auditor's Account and rejecting another.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

Benjamin A. Richmond and D. James Blackiston (with whom was *D. W. Sloan* on the brief), for the appellants.

J. Semmes Devecmom, for the appellees.

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BRYAN, J., delivered the opinion of the Court.

This is an appeal from the Circuit Court for Allegany County, sitting in equity. The proceedings appear to have been somewhat irregular, but as no question has been made on this ground, we find it unnecessary to consider it.

It is admitted that there is but one point in controversy, and therefore we shall proceed to examine it without making a detailed statement of the other matters appearing in the record. It is shown in the evidence that in August, eighteen hundred and sixty-two, Thomas Devecmon, at a public sale for taxes, purchased a tract of land called "Harker Place," and another tract called "Sugar Hill," both lying in Allegany County, and other tracts of land in said county. And, that, he having died before receiving a deed for the same, the collector, after his death, conveyed the land to his widow and children; the children then being infants under the age of twenty-one years. And that John S. Combs, who was the uncle of the infant Devecmons, took possession of the tracts called "Harker Place" and "Sugar Hill," and managed them for the benefit of the widow and children, accounting to them for the rents and profits. In the year eighteen hundred and sixty-eight, Benjamin E. Green, who alleged that he was the owner of these tracts at the time of the tax sale, brought an action of ejectment to recover them, and obtained a judgment by default against the casual ejector, but he made no attempt to take possession of the land. In July 1884 these tracts were sold under a decree in equity against Green, and were purchased by Combs who took the deed in his own name. He charged the price of the property, which was eight hundred and sixteen dollars, to the Devecmons on his books. There is no doubt that it was his intention that they should have the benefit of the purchase; and it is perfectly evident that all his dealings with them were marked with strict integrity and by a benevolent desire to promote their pecuniary interests. The circumstances were such that it was a matter of prudence to extinguish Green's title, if it could be

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done on reasonable terms. The Devecmons claimed under a tax title, and such a title was very precarious before the changes made by the Act of 1874. It was necessary for the party setting it up to prove that every requirement of the law had been observed, and that the sale was regular in every particular. Very often there were mistakes and omissions in the proceedings, and even where they were perfectly regular it was difficult to prove the facts after the lapse of many years. The Devecmon title accrued more than twenty years before the purchase by Combs, and they had held possession under it all that time. But the Statute of Limitations had not given any additional security to it, because at the time of the tax sale the owner was absent from the State, and he does not appear to have returned until 1866, about eighteen years before the purchase by Combs. The judgment in ejectment did not determine any question of title. It merely gave Green the right to obtain possession, but as no execution was issued on it within twelve years from the time of its rendition, or afterwards, it was barred and of no effect. We lay no stress on the right of possession acquired by this judgment as an obstacle to the running of limitations, because with or without the judgment, the entry of Green was not barred when Combs bought the property. But however prudent it may have been for the Devecmons to acquire Green's title, Combs had no right to buy it with their money without their consent. They were all of age at the time, and he might have consulted them. There is no evidence in the record that he did so. There is a letter from him to J. Semmes Devecmon, in which he speaks of having paid for the property. But this is a slender foundation for an inference that the family had agreed that their money should be invested in the purchase. In point of fact he never conveyed the title to them, and never tendered a conveyance of it; but retained it in his own name. They probably all knew that he had made the purchase. Five of them sold to him their interest in the land; the deeds show

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that they conveyed to him "all their right, title and interest" in it. Their interest was such as was derived from the tax sale; and he had the title of the original owner. There is nothing in the deeds to show that it was understood by either grantors or grantee that the Devecmons had agreed that their money should be applied to the purchase of Green's title. If this were the understanding, it would have been very easy and very natural to insert the statement in the deeds; but it is not in our power to interpolate it. Combs died in October, 1885, and Alexander Shaw and Christian Devries became his executors. Among the proceedings there is a prayer that they should account with the widow and heirs of Thomas Devecmon for the rents and profits of "Harker Place" and "Sugar Hill," and that they should be charged with the price of the property above mentioned, purchased by Combs. This is the only question presented to us by this record. The Court below decreed that they should account, and should be charged with this sum. We are of the same opinion. But although we hold that the price paid for the title of Green must not be charged to the Devecmons, yet we must observe that this title belonged to Mr. Combs, and that at his death it was descendible to his heirs at law.

The decree must be affirmed, but a majority of the Court think that the appellants ought to be allowed to apply for a decree remanding the case for further proof in regard to the purchase of the property by Combs and its binding effect upon the Devecmons, if they should elect to do so within thirty days from this date; and it is so ordered.

Decree affirmed with leave to the appellants to move to remand the case for further testimony, if they elect to do so within thirty days.

(Decided March 27th, 1895.)

Md.]

Syllabus.

WILLIAM H. HOLT *vs.* THE TENNALLYTOWN
AND ROCKVILLE RAILROAD COMPANY.

Rule Security for Costs.—Constitutional Law.

The provisions of Code, Art. 24, sec. 9, requiring non-resident plaintiffs to give security for costs, when a rule is laid upon them, is not in conflict with Art. 4, sec. 2 of the Constitution of the United States, concerning the privileges and immunities of the citizens of the several States.

A rule security for costs laid upon the plaintiff in one Circuit Court, is subsequently enforceable in the Circuit Court of another county, to which the case is removed for trial; and the removal does not make any change in the time within which the plaintiff is required to comply with the rule.

The right of a defendant to move for a judgment of non-suit for the failure of the plaintiff to comply with a rule security for costs, is not lost by a delay of eight months, but continues up to the time of trial.

Appeal from a judgment of *non prosequi* entered in the Circuit Court for Anne Arundel County.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Arthur H. O'Connor (with whom were *Chapin Brown, Thos. Anderson and W. Veirs Bouic, Jr.*, on the brief), for the appellant.

Frank H. Stockett, for the appellee.

FOWLER, J., delivered the opinion of the Court.

The motion to dismiss the appeal in this case must be overruled, for it appears from the affidavits filed that the delay in transmitting the transcript of record to this Court was the fault of the Clerk of the Court below.

The plaintiff, having been injured as he alleges, by the

negligence of the defendant, a railroad corporation, he instituted an action in the Circuit Court for Montgomery County to recover damages. Issue having been joined, the defendant suggested that the plaintiff was a non-resident, and asked the Court to place him under a *rule security for costs*, which was accordingly done, and on the same day the defendant also filed a suggestion for removal, and an order was thereupon passed to remove the cause to the Circuit Court for Anne Arundel County, in which Court the record was filed on the 19th of April, 1893. On the 16th of October following, the defendant moved to enforce the *rule security* which had been laid in Montgomery County. This motion, at the instance of the plaintiff's attorney, was not pressed. At any rate no action was taken, and the case was continued. On the first day of January term, 1894, the defendant again moved the Court to enforce the rule security of the Circuit Court for Montgomery County, which was accordingly done. The plaintiff being in default a judgment of *non pros.* was therefore entered against him.

1. The question of the constitutionality of the provision of our Code, Art. 24, sec. 9, requiring non-resident plaintiffs to give security for costs as therein provided, was fully argued by plaintiff's counsel, but it was said forty years ago by our predecessors that this law, having then been in operation for more than half a century, and having always been recognized by the profession, both on the bench and at the bar, as a valid law, they were not disposed to declare it a nullity. *Haney v. Marshall*, 9 Md. 194. And at this late day we are equally unwilling to interfere with its operation by declaring it unconstitutional and void, because in violation of section 2, Article 4, of the Constitution of the United States, this being the same ground of objection which was urged in 9th Md.

2. Is the *rule security* of the Montgomery County Court enforceable in the Circuit Court for Anne Arundel County? We think it is. This view is in conformity with the general practice, and will enlarge the operation of the law in ques-

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tion, which was passed for the protection of resident defendants. If the rule can be enforced only in the county where it is laid, the plaintiff could escape from all obligation to comply with it by simply filing a suggestion for removal. And in that event the defendant would be compelled to have another rule laid in the county to which the cause should be removed or lose the protection the law affords him. Nor do we think that the fact of removal should be allowed to make any change in the time within which the plaintiff is required to give security. In this case the rule was laid at the March term, 1893, of the Montgomery County Court, and the plaintiff had until the second day of the next term of that Court to comply, that is to say, until the sixth of June, and having failed so to do, he was in default at the time the judgment of *non pros.* was entered, namely, at the January term, 1894, of the Anne Arundel County Court.

3. It was suggested that the defendant waived its right to enforce the rule because of delay, and that having failed to act more promptly, it ought not to have been allowed to take advantage of the plaintiff's default. In the case of *Heinekamp & Sons v. Beatty*, 74 Md. 388, the rule security was laid on the 23rd September, 1889, and the judgment of *non pros.* for failure to comply with it was not moved for until the 30th September following, or more than nine months after default. It is true there was no question made in the case just cited, as to delay on the part of the defendant, but it seems to have been assumed by counsel and Court, that notwithstanding the lapse of time, the defendant would have been entitled to enforce the rule if it had not been complied with before the judgment was entered. In the case we are considering there was a delay of less than eight months, the default of the plaintiff having occurred on the sixth of June, 1893, and the judgment having been taken on the 16th January, 1894. But, as it appears to be conceded that the defendant may obtain the rule at any time before the beginning of the trial, unless temporarily waived as by continuance by consent, (*Haney*

v. *Marshall*, 9 Md. 209; *Spencer v. Trafford*, 42 Md. 1; 2 *Poe Plead. and Prac.*, sec. 78), it would seem to follow that the right to enforce the penalty for failure to comply with the rule must continue to exist to the same period.

Finding no error, the judgment will be affirmed.

Judgment affirmed with costs.

(Decided April 4th, 1895.)

THE STATE OF MARYLAND, EX RELATIONE, THE BALTIMORE, CANTON AND POINT BREEZE RAILWAY COMPANY *vs.* FERDINAND C. LATROBE, MAYOR OF THE CITY OF BALTIMORE, ET AL.

Mandamus.—License to Dig up Streets.—Construction of Ordinance Authorizing Street Railway to be Built Within a Certain Time.—Forfeiture of Rights Under the Ordinance.

The remedy by *mandamus* is not one which is accorded *ex debito justitiae*. The writ is a prerogative one, and unless the right, which the relator seeks to enforce, is clear and unequivocal, a *mandamus* will not be granted.

An ordinance of Baltimore City provided that no person should, under any pretext, dig up any of the streets of the city without having first obtained a written permit therefor from the City Commissioner, approved by the Mayor. *Held*, that if a person or corporation is duly empowered by ordinance or legislative enactment to do an act involving such digging up of streets, as, for instance, to lay a street railway, neither the Mayor nor the City Commissioner can prevent the performance of that act by refusing to issue the permit, and in such cases its issue, not involving the exercise of a discretion, can be enforced by *mandamus*.

But if a person or corporation has not the right to do the thing which it is proposed to do under the permit applied for, the Mayor would be under no obligation to issue it, not because he has a discretionary power to grant or withhold it, but because, either with or without the permit, the proposed act would be illegal.

Md.]

Syllabus.

An ordinance of Baltimore City, passed in April, 1892, authorized a certain railway company to lay tracks, &c., upon designated streets, and directed that the company should commence the work of constructing the tracks within six months from date, and should complete the road within twelve months thereafter, otherwise the rights granted to be null and void. A proviso declared that this limit of time should not apply in case of delay caused by other parties, or in case any of the designated streets may not have been graded and paved at the time of the approval of the ordinance, or in case any of such streets should be undergoing repairs so as to interfere with laying the tracks, but that then the time for the completion of the road shall be extended for a period of twelve months from the completion of such grading or repairs, or the removal of such delay. An ordinance of the city, of November 25, 1892, provided that no person or corporation should dig or tear up any of the streets of the city without having first obtained a written permit approved by the Mayor. When the railway company's ordinance was passed, some parts of some of the designated streets were not graded and paved, and a bridge on one of the streets was not completed until October, 1893. The railway company caused thirty feet of track to be laid on one street on October 7, 1892, and nothing more was done towards constructing the road until June 7, 1894, when application was made to the Mayor and City Commissioner for a permit to dig up the streets, for the purpose of laying the tracks of the company. Upon their refusal of the application, a petition was filed praying for a mandamus directing the issue of such permit by the Mayor and Commissioner. Held,

- 1st. That under the ordinance the company was bound to begin the work of laying the tracks within six months from its enactment, and that the extension of time in the proviso to twelve months after the completion of the grading of the streets related, not to the beginning of the work by the company, but to its completion after its progress had been interrupted.
- 2nd. That because some of the designated streets were not graded and paved at the time of the passage of the ordinance, the company was not relieved from the necessity of beginning the work within six months thereafter, but the time limit was only suspended in case the specified obstacles arrested the actual construction.
- 3rd. That the laying down of only thirty feet of track in October, 1892, was not such a beginning of the work as was contemplated by the ordinance.
- 4th. That since the company had failed to comply with the conditions of the ordinance its rights under the same were lost and it was not entitled to the mandamus asked for.

5th. That after the lapse of the time limit, the enactment of the ordinance requiring permits to dig up the streets was in effect a denial of the company's authority to exercise the rights granted to it, upon conditions which had not been complied with.

6th. That under these circumstances the failure of the company to begin and complete the road within the time specified by the ordinance could be availed of by the Mayor as a defence to the application for a writ of *mandamus*.

Appeal from an order of the Court of Common Pleas (PHELPS, J.), dismissing a petition for a writ of *mandamus*.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

Bernard Carter, for the appellant.

The appellant contends that the true interpretation of the 12th section of the ordinance is as follows: 1. That while by the *first* part of the section the company is required to *commence* the work of laying down and constructing its railway tracks within six months from the approval of the ordinance, yet by the *proviso*, it is *entirely relieved* of this obligation, and no time is prescribed for the commencement of said work in *either* one of the *three* following contingencies, that is to say: (1) in case of delay caused by other parties, or (2) in case *any* of the streets named for the route of the railway, may not have been *graded* and *paved* at the time of the *approval* of the ordinance, or (3) should *any* of said streets be undergoing repairs in such manner as would interfere with the laying and constructing of the said railway tracks. 2. While by the *first* part of the section, the company is required to *complete* its road and begin the running of its cars within twelve months from the *approval* of the ordinance, yet by the *proviso*, it is declared that in *any* one of *three* contingencies the twelve months time for the completion of the road shall *not* be computed from the *approval* of the ordinance, but from *other* points of time; the three contingencies thus named, are either in *case* of delay caused by other parties, or *in case* *any* of the streets named in the

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ordinance as forming the route of the railway may not have been *graded* and *paved* at the *time* of the *approval* of said ordinance, or should any of said streets be undergoing repairs by the city authorities in such manner as would interfere with the laying and constructing of said railway tracks ; and it is declared by said proviso, that if any one or more of said three things shall be, then the time of the completion of said road, instead of being twelve months from the *approval* of the ordinance, shall be extended to a period of twelve months from the *removal* of the delay caused by other parties, if the action of other parties shall have caused delay ; or if *any* of the streets were not graded and paved or were being repaired at the time of the approval of the ordinance, then the time should be extended for twelve months from the completion of the grading of all of the streets, or the completion of the repairs.

So far as the completion of its road is concerned, the twelve months period for said completion is not to be computed from the approval of said ordinance, as stipulated in the first part of said section 12, but, according to the terms of the proviso to said section, that is to say, from the time when the grading and paving of both of said streets shall have been completed ; and that therefore, as the grading and paving of a portion of Lexington street was not completed until October 23d, 1893, the time for the completion of its railway by the appellant (even if said Lexington street was the only street forming part of the route of the road not graded and paved at the time of the approval of the ordinance) would not expire till October 23, 1894, and the appellant was entitled to the permit it asked for to enable it to construct its road when it asked for it on June 7, 1894. And as Canton avenue, between Cannon and Luzerne streets (forming part of said route), was not graded and paved at the time of the trial of this case below (and so far as there is any evidence before the Court, is not yet graded and paved), the twelve months mentioned in the proviso will not (at the least) have expired until June, 1895.

There was no necessity for the Mayor and City Council of Baltimore to put in the ordinance any limitation of time for the beginning and completion of the work ; and, therefore, it could make any thing it saw fit, a reason for wiping out the limitation. No harm could come to anyone by a total *absence of any limitation* as to the time for the building of the road, as it was always in the power of the Mayor and City Council of Baltimore to repeal the ordinance ; and if repealed before work was begun on the road, to repeal it without making any compensation of any kind. *Lake Roland R. R. Co. v. M. & C. C. of Baltimore*, 77 Md. 352. As the city has in many instances placed no limitation of time for the building of the passenger railways, the construction of which it authorized, there is no reason why, when it did insert these limitations, it should not have made them inapplicable in any state of case it *chose to name*, and in any state of case in which it thought there might be a possible reason for the exemption from such limitation.

But independently of the foregoing, and even supposing *ex gratia argumenti*, that the appellant did not comply with the requirements of the 12th section as to the commencement and completion of its railway, yet, as the Mayor and City Council of Baltimore had taken no action to enforce the forfeiture of the rights granted by said ordinances, it is respectfully submitted that those rights were in full existence at the time the application was made by the appellant to the City Commissioner for the permit to proceed with the construction of its road, and therefore neither the City Commissioner nor Mayor had any right to refuse *said permit* because it was not within the power of either of said officials to *enforce the forfeiture* of those rights, as a consequence of the failure by the appellant to comply with the requirements of said section 12. *Hodges v. Balto., &c., Co.*, 58 Md. 623 ; *Hiss v. Hampden Ry. Co.*, 52 Md. 255 ; *Schulenberg v. Harriman*, 21 Wall. 44 ; *Farnsworth v. M. & P. R. R. Co.*, 92 U. S. 66 ; *McMechin v. U. S.*, 97 U. S. 218 ; *St. Louis v. McGee*, 115 U. S. 473 ; *Railroad Co. v. City*, 44 La. An. 751.

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Now, suppose the Mayor and City Council of Baltimore had never passed the *permit* ordinance, and matters remained as they were before said ordinance was passed, that is to say, no permit was issued to persons or corporations authorizing them to put down structures on the streets; and suppose the appellant had proceeded in June last to go on with its work, and the Mayor had applied to the Equity Court for an injunction to prevent it, on the ground that it had not complied with section 12, and, therefore, had forfeited its rights? Could such a bill have been maintained? If it could be, then the *Mayor* can *enforce* a forfeiture, when the other branch of the city government (the legislative branch), has taken no action for this purpose. Now, if *affirmative* action on the part of the city is required to enforce a forfeiture, which is the result of the *Hodges case*, then certainly the Mayor, who at the best is only one-half of the city government, cannot enforce it. Now, if the bill for injunction by the Mayor alone would not have lain for the reasons stated, then it follows that in June last the right of the appellant under the Ordinance No. 50, of April, 1892, were in full force, and it has the legal right to proceed with its work.

If the appellant was entitled to proceed with the construction of its road under Ordinance No. 50, of 1892, authorizing it to build its road, the City Commissioner was obliged to issue a permit to it to tear up the streets for the purpose of building it, and neither the City Commissioner or the Mayor had any right to refuse to issue the permit, and had *no discretion whatever* in the premises.

Thomas G. Hayes, City Counsellor, and Arthur W. Machen (with whom was *William S. Bryan, Jr., City Solicitor*, on the brief), for the appellees.

Mandamus does not lie. By the Act of Assembly, 1890, chapter 370, its was enacted that the Mayor and City Council of Baltimore should have power to regulate the use of the streets, lanes and alleys in the city of Baltimore,

by railway or other tracks, &c. Under this Act the ordinance of 1892-93, No. 2, approved November 25th, 1892, was passed, which wholly prohibits all persons, natural or corporate, from digging up or disturbing the surface of any of the streets of the city, without having first obtained a permit therefor from the City Commissioner, *approved* by the Mayor.

Will *mandamus* lie to compel the Mayor in such a case to give his approval? Both reason and authority forbid. If the judgment of a judicial tribunal is substituted for the Mayor's judgment upon the matter, it is not *his* approval which is given, but the approval of a Court. But the Mayor and City Council, having power altogether to refuse permission to disturb the surface of the streets or absolutely repeal Ordinance No. 50, by the ordinance of November, 1892, delegate to the Mayor the office of passing upon each case and deciding whether or not the applicant is entitled to the permit he asks for. The Mayor signs every *ordinance* which he approves, but his judgment in this cannot be controlled by an external power; no more can it be controlled when he is asked to approve a permit of the kind in question. His approval is an act of his own mind, and he must necessarily exercise his own judgment in the matter.

To read the proviso at the end of the 12th section in the manner claimed by the appellant's counsel, involves practically a repeal of the preceding express enactment. That never could have been the legislative intention, and to give the proviso such effect is to convert it into a device to cover up a latent meaning in a cloud of ambiguous words, apparently consistent with the previous enactment, but concealing a purpose to nullify it. Such a meaning, if allowed, would be as derogatory to the promoters of the scheme as deceptive and injurious to the public.

The entire omission in the proviso to provide for postponement of the *commencement* of work under the ordinance, is very significant. On the whole, two conclusions, we

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think, follow necessarily from the reading of the ordinance in the light of the true rule of construction: First, that there is no provision for any postponement of *commencing* work; second, that it was intended that the work, after expiration of the six months from the time of the approval of the ordinance, should be diligently prosecuted whenever practicable, and that delay in completion was only excusable as to such portions of the railway as the specified causes directly operated upon. The object of the 12th section must be regarded. And any interpretation of it which would relieve the petitioners from beginning the substantial construction of any of the proposed railways for a period of over two years from the date of approval of the ordinance, would defeat the purpose of the Mayor and City Council, which certainly must have been that the grantees should actually and in good faith begin the work of constructing the railway within six months, and then prosecute it with despatch so as to complete all parts of it within two years, except in so far as prevented by obstacles beyond their control, and in the event of the existence of such obstacles, then, in so far as they might operate, within twelve months after the removal of them. *People v. Broadway, &c., Co.*, 126 N. Y. 29.

The appellant's contention that the right granted by the ordinance is in the nature of a corporate franchise, not open to attack except in a direct proceeding, is insubstantial. The Mayor and City Council, by the ordinance of 1892, No. 50, authorized the occupation of the street for railway purposes, subject to certain limitations and conditions. One was that the work should be commenced within a prescribed period of time. Unless that is fulfilled, there is no grant. The condition inheres in the grant, and is a part of it. The grantees accept the privilege as it is given, and not otherwise. It is true the municipality which makes the qualification can dispense with it, and therefore *third persons* have no right to interfere with the exercise of the granted privilege in the absence of an insistence upon it by the city. This

reasonable proposition was affirmed in *Hodges v. The Baltimore Union Passenger Railway Company*, 58 Md. 323. But the city may insist upon it. It does so when, as in this case, the Mayor, its executive, acting by virtue of a city ordinance, refuses to permit the grantees of the privilege to make use of it after the expiration of the time within which only, under the terms of the grant, it was authorized to put it in use. Relator's counsel, putting a very strained and unauthorized construction upon a passage in the opinion of this Court in *Hodges v. The Baltimore Union Railway Company*, contended below, and we have to presume will contend here, that to enable the Mayor and City Council of Baltimore to take advantage of the condition it has prescribed, resort must be had to a proceeding, in the nature of a *quo warranto*, to *forfeit* the so-called franchise. But, for the granting power to insist upon the condition it has imposed, is not, properly speaking, an *act of forfeiture*; the right has lapsed or expired by force of its own limitation, and the city authorities, acting within the scope of powers entrusted to them, may enforce the ordinance and refuse to allow a violation of it.

The rights conferred on the appellant by Ordinance No. 50, were but a license revocable at the pleasure of the city before it was executed, and revocable after it was executed, upon the payment of a fair indemnity. *Lake R. E. Ry. Co. v. M. & C. C. B.*, 77 Md. 386. If, then, the city could at any time wipe out the whole of Ordinance No. 50, by its total repeal, it certainly could attach to the exercise of the license the additional condition of requiring the appellant to obtain a permit approved by the Mayor before tearing up the streets of the city. It may and does, by an express power delegated to the Mayor by Ordinance No. 2, put it in the power of the Chief Executive of the City of Baltimore to decide, in the exercise of his discretion and judgment, whether the public interests justify the tearing up the streets for railway tracks at the time the permit is sought. This unquestionably does suspend the license. The city

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had a perfect right to do this. Ordinance No. 2 was the exercise by the Mayor and City Council of Baltimore of a power conferred both by Act 1890, ch. 370, and existing under its general powers. This being so, whether or not it is wise or judicious to confer such power upon the Mayor, is not a judicial question. The appellant has it in its power to apply to the legislative department of the city, and if that department considers it proper, it may, by a proper ordinance, except the appellant from the operation and effect of Ordinance No. 2. This is the only course open to the appellant when the Mayor, in the exercise of his discretion, has, for public reasons and for the interest of the public, refused to approve a permit to tear up the streets of the city. The act of the Mayor, under the powers of the municipality delegated to him by Ordinance No. 2, was the act of the corporation.

McSHERRY, J., delivered the opinion of the Court.

The Baltimore, Canton and Point Breeze Railway Company is a body corporate, and by ordinance number 50 of the Mayor and City Council of Baltimore, approved April the eighteenth, eighteen hundred and ninety-two, it was authorized to lay its tracks upon and along certain designated streets of Baltimore City. By the 12th section of the ordinance, the work was required to be commenced within six months from the approval of the ordinance, and to be completed within twelve months thereafter, "otherwise," so the section declares, "the rights and privileges herein granted shall be null and void." A qualifying proviso then follows. Its terms and provisions, which vitally affect the pending controversy, will be fully stated later on. By ordinance number two, approved November the twenty-fifth, eighteen hundred and ninety-two, it was declared unlawful for any person, under *any pretext* or for *any cause whatever*, to dig up any portion of the streets, lanes or alleys of the city "without first having obtained a written permit therefor from the City Commissioner approved by the Mayor." On the

seventh day of October, eighteen hundred and ninety-two, without the knowledge of the City Commissioner, and not under his supervision, the railway company caused *thirty feet* of track to be laid on North Bond street, south of North avenue, and although many of the streets over which the proposed railway was projected to be laid were graded and paved and in a condition to have tracks constructed upon them, no further steps were taken to build the line until June the seventh, eighteen hundred and ninety-four, when application was made to the City Commissioner for a permit, and to the Mayor for an approval of a permit, to dig up the streets for the purpose of laying the tracks. The Mayor and City Commissioner refused to issue the permit, and they based that refusal on the ground that ordinance number fifty, of eighteen hundred and ninety-two, had not been complied with in such manner as would authorize the construction of the work. Upon June the eleventh, eighteen hundred and ninety-four, The State of Maryland, on the relation of the Baltimore, Canton and Point Breeze Railway Company, filed a petition in the Court of Common Pleas against the Mayor and the City Commissioner praying that a writ of *mandamus* be granted requiring the City Commissioner to issue and the Mayor to approve a permit authorizing the relator to dig up the streets mentioned in ordinance number fifty, for the purpose of laying upon those streets the tracks of the relator's railway. The respondents duly answered, and on July the twenty-eighth an order was signed denying the relief sought and dismissing the petition altogether. From that order this appeal was taken.

There are two questions arising out of these facts. The one is whether the Mayor had a discretion to grant or refuse the permit; and, upon the assumption that he had not, the other question is whether, when the application was made for the permit, the relator had such a clear right and authority under ordinance number fifty to lay *its* tracks as entitled it to relief by *mandamus*.

With respect to the first question, but little need be said.

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The law is definitively settled both here and elsewhere that whenever the performance of a duty is dependent upon the exercise of judgment and discretion on the part of the person to whom the performance of that duty is assigned, that judgment and that discretion will never be interfered with, fettered or controlled by the writ of *mandamus*. The reason for this is apparent, and it is that there is no warrant of law justifying the substitution of the judgment of the Court in the place of the discretion and judgment of the individual exclusively entrusted with the performance of the particular duty. But when the duty imposed is strictly a ministerial one, is absolute and imperative, and in its discharge requires the exercise of neither official discretion nor judgment, then a *mandamus* will lie to enforce its performance. *Wailes v. Smith*, 76 Md. 477; *Madison v. Harbor Board*, 76 Md. 398; *Devine v. Belt*, 70 Md. 352. To which class of duties, then, discretionary or strictly ministerial, does the one relating to the granting and approving the permit applied for by the relator belong? Where a clear right exists to do an act, as for instance, to lay a street railway on a public thoroughfare of the city, the Mayor and City Commissioner have no authority to refuse a permit allowing the streets to be torn up in furtherance of that object. If the act to be done be a lawful one and be sanctioned by legislative enactment or by a city ordinance, and if the person or body corporate proposing to do it be duly empowered to perform it, the Mayor and City Commissioner cannot, nor can either of them, make the act illegal or prevent its performance by refusing to issue a permit, which, if granted in the case supposed, would add nothing to the pre-existing power, and whose sole effect would be to indicate to the police authorities that the interference with the streets was no invasion of the laws of the municipality. To concede to the Mayor a discretion to grant or withhold a permit in such a case would clothe him with authority to nullify at his pleasure a formal grant made by the City Council. There may possibly be instances where, under ordinance number two, the Mayor

would have a discretion ; but when permission has, by ordinance, been distinctly granted to a person to do an act which necessarily requires and in terms is declared to involve in its proper performance the digging up of the city streets as a part of the very thing to be done, the Mayor obviously has no right by a simple refusal of a permit to defeat the doing of the act authorized to be done, and thus practically to abrogate and repeal the formal permission granted to do it. Clearly, then, if when the permit was applied for in the case at bar, the relator possessed an undoubted power under ordinance number fifty to occupy with its tracks certain streets of Baltimore City, it was the duty of the Mayor to approve that permit, and this duty involving the exercise of no discretion whatever was, if it existed at all, plainly and imperatively ministerial. But, if there were then no authority under the laws of the State or under the ordinances of the city to do the act, for the doing of which the permit was sought, the Mayor cannot be required to issue the permit, because even if issued it would not, under such conditions, of its own vigor make that legal which would otherwise be illegal. It follows, then, that if a person or a body corporate has no lawful right to do the thing which it is proposed to do under the license applied for, the Mayor would be under no obligation to issue the permit, not because he has a discretionary power to grant or withhold it at his option or according to his judgment, but solely because either with or without the permit, the act proposed to be done would be illegal. If there were no duty on his part to issue the permit, his refusal to grant it would furnish no ground for requiring him by *mandamus* to do that which under the law he had no authority to do at all. As a consequence, the question is as to the *power* of the Mayor to issue the permit ; and that question is one for judicial determination. And this brings to us the second and vital inquiry arising on the record. The solution of that inquiry depends upon the meaning of the twelfth section of ordinance number fifty, and it will therefore be necessary to

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quote that section in full, so that its exact provisions may be seen. It is in these words:

"That the said proprietors, their associates or assigns, shall commence the work of laying down and constructing the railway tracks aforesaid, within six months from the approval of this ordinance, and shall complete the said work and commence the regular running of cars within twelve months thereafter, otherwise the rights and privileges herein granted shall be null and void; provided that the provisions of this section shall not apply in case of delay caused by other parties, or in case of any of the streets hereinbefore named may not have been graded and paved at the time of the approval of this ordinance, or should any of said streets be undergoing repairs by the city authorities in such manner as would interfere with the laying and constructing of the railway tracks aforesaid, then the time for the completion of said railways shall be extended for a period of twelve months from the removal of such delay, or the completion of such grading and paving or repairs."

It is needless to allude to the familiar rules and canons of construction frequently invoked in the interpretation of legislative enactments, because the language employed in the section just transcribed is so free from obscurity or uncertainty that little or no difficulty in ascertaining its meaning and purpose is or can be presented. There was, obviously, a reason for inserting the provision fixing a time for beginning and for completing the construction of the road. As the railway was, when finished, to occupy a number of streets, all of which would have to be interfered with to some extent during the progress of the work on the road, it was clearly for the protection of the public interests and for the convenience of persons who might use these thoroughfares, that the requirement exacting proper diligence in beginning and in prosecuting the work to completion was incorporated in the ordinance. It was not an idle or meaningless clause, and its terms are neither ambiguous nor equivocal. That it was intended to be operative

and effective, the City Council left no room for speculation, because for a failure to comply with it, they, in the same sentence, by plain language, whose meaning is unmistakable, imposed the drastic penalty of a revocation of all the rights and privileges granted by the preceding sections of the ordinance. As, however, it was apparent at the time the ordinance was passed that conditions then existed and that others might arise later on, which, while not retarding the prompt beginning of the work, might possibly prevent its ultimate completion within the allotted period of twelve months, the saving proviso was inserted. With a view, then, of suspending for a definite time the prescribed penalty, and to arrest its operation upon a failure to complete the road within the limit of time designated, the proviso was added. It contains three contingencies, each one of which has specific reference to an interruption in the actual progress of the work, whereby its completion would be unavoidably delayed through no fault or *laches* of the relator. There is not a suggestion in the whole ordinance that the relator's voluntary delay in beginning and in prosecuting the work, though not actually impeded or stopped in any one of the three ways specified in the proviso, should be treated or considered as a waiver or suspension of the penalty. The policy and purpose of the twelfth section, as well as its natural reading, imperatively forbid the adoption of a different construction. If delays were caused by other parties, not the relator; or, if the streets over which the road was to be laid were not graded and paved when the ordinance was approved; or, if any of the streets were undergoing repairs so as to interfere with the laying of the tracks, *then*, and it is put as a consequence of *these* interruptions, "the time for the *completion* of said railways"—not for the *beginning* of the work thereon—"shall be extended for a period of twelve months from the removal of such delay or the completion of such grading and paving or repairs." It is obvious, then, that the extension of time relates not to the beginning of the work, but to the *completion* thereof, after

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its substantial progress had been arrested in one or more of the three ways indicated. As we have already explained, on October the seventh, eighteen hundred and ninety-two, or just ten days before the expiration of six months from the approval of the ordinance, the relator laid down *thirty feet* of track on Bond street and then voluntarily stopped. This was manifestly not such a beginning of the work as the ordinance contemplated. The relator was not prevented by delays caused by third persons, or caused in either of the other modes named in the proviso, from proceeding with the work ; nor did it go on with the work thus commenced, as according to the plain meaning of the ordinance, it was bound to do until it reached an ungraded and unpaved street or encountered a street undergoing repairs. The company, however, assumed that the proviso did not relate solely to the time of *completing* the work, but that its effect was actually to strike down and completely nullify the express limit of six months within which to begin the work ; and, as a consequence, it insists that it was under no obligation to do anything towards building the road, if, when the ordinance was approved, any of the obstacles in the way of the final completion of the whole work existed at any point upon the entire route. To this we cannot agree, because when the proviso declares that the "provisions of this section shall not apply" in the three designated instances, its manifest meaning is that the preceding limit as to time is not to apply in the event that the specified obstacles should present physical obstructions to the continuous prosecution and completion of the work ; and that the time limit should then be suspended, but only in so far as these physical impediments interrupted the progress of actual construction. In support of this view the case of the *People v. Broadway R. R. Co.*, 126 N. Y. 29, is directly in point. It follows, then, that according to the terms of the twelfth section the relator, when it made application for the permit in June, eighteen hundred and ninety-four, had no right or authority to lay its tracks, under ordinance number fifty.

Whether that want of authority or lack of power can be availed of in this proceeding will be discussed later on.

Now, the remedy by *mandamus* is not one which is accorded *ex debito justitiae*. The writ is a prerogative one, and unless the right which the relator seeks to enforce is clear and unequivocal, it will not be granted. *Brown v. Bragunier*, 79 Md. (29 Alt. Rep. 7); *Weber v. Zimmerman*, 23 Md. 45; *Hardcastle v. R. R. Co.*, 32 Md. 32; *Legg v. Mayor, &c.*, 42 Md. 203. If the construction which we have placed upon the twelfth section of ordinance number fifty be the correct one, as we believe it to be, then it is perfectly manifest, as already observed, that the relator on June the seventh, eighteen hundred and ninety-four, had no such clear and unequivocal right to dig up the streets as it lays claim to in its petition. And if this be so, then obviously there was no such plain co-relative duty devolved upon the Mayor by ordinance number two, of November, eighteen hundred and ninety-two, as to make it unconditionally obligatory on him to grant the permit applied for. There being then neither the clear and unequivocal right, on the one hand, to do the act proposed to be done, nor, on the other hand, the plain ministerial duty to issue the permit allowing it to be done, there is no case presented for redress by the writ of *mandamus*.

But it was objected that under the decisions in the *Canal case*, 4 G. & J. 1; *Hodges' case*, 58 Md. 603, and *Bonaparte's case*, 75 Md. 349, the failure of the company to begin and complete the construction of its road within the times limited in the ordinance could not be availed of collaterally by the Mayor of the city as a defence in this proceeding. In *Hodges' case*, the railway company did not begin to construct its road within the time prescribed by the ordinance which authorized the tracks to be laid; and when the company did thereafter proceed to construct its road, several persons who owned property which abutted upon Park avenue, one of the streets proposed to be occupied, filed a bill in equity for an injunction to restrain the building of the road. They claimed amongst other things that

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the company, by its failure to begin the work within the time limited, had forfeited its rights under the ordinance to build the road at all. Upon the question as thus presented, it was held that the provision fixing a limit was intended for the benefit of the city, and was one which its authorities might waive at pleasure, and was, consequently, one which could not be invoked by a private individual. "No principle," say this Court, "is better settled than that a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation." But it cannot be pretended that we are confronted with the same conditions now. This defence by the Mayor is not an attempt by a private person to enforce in a collateral proceeding a cause of forfeiture. The executive of the very municipality which originally granted the privilege to lay the tracks, in acting under a valid subsequent ordinance, whose due execution he was charged with faithfully enforcing, refused to grant a permit prescribed by ordinance number two, of November, eighteen hundred and ninety-two. The reasons assigned by him are immaterial, if he had no power to approve the permit. Now, ordinance number two, approved a month *after* the expiration of the limit of six months fixed by ordinance number fifty for the commencement of the work, is a declaration by the Mayor and City Council that the municipality did not waive the time limit in ordinance number fifty, nor the consequences following the non-observance thereof; for it expressly prohibited, from and after its passage, the digging up of the streets under *any pretext* or for *any cause*, without a permit being first procured—a broad restriction that did not exist during the whole period allowed for beginning the work under ordinance number fifty, and one utterly inconsistent with the hypothesis that the city authorities recognized the company's unqualified right to lay the tracks thereafter. Its effect was, *not* to waive the enforcement of the time limit, but to provide a direct and speedy mode for

putting into force the provision containing that limit. It substantially ordained that the city not only refused to waive the time limit, but that it designed to enforce it, and therefore the ordinance exacted a permit as a means to prevent that from being done which previously could have been lawfully done, but which, by reason of the lapse of the time within which it ought to have been done, could not afterwards lawfully be performed. If the city, by a direct repeal of ordinance number fifty, could have taken away the rights conferred by that ordinance, and of this there can be no question, then it could equally accomplish the same result by a general enactment that involved in its operation and effect a denial of authority to exercise those rights which, as between the city that granted them and the company that had accepted them, coupled with the conditions, were lost and had lapsed by a failure on the part of the company to comply with those very conditions. Of course, legislation of this sort to be effective as a repeal or a revocation of previously granted rights and privileges, for a breach of a condition subsequent annexed to the grant, must show an intention to reassert title and to resume possession. And as we understand it, such was, at least, one of the objects and purposes of ordinance number two, of November, 1892. After the lapse of the time limit and the enactment of ordinance number two, the Mayor had no right to grant the license; and the city, by adopting the last named ordinance after the expiration of the time limited for beginning the work, having asserted an enforcement of the consequences following from a breach of that condition, the case, as thus presented, materially differs from those cited above, and whilst they announce a perfectly correct and well-established principle, this case, for the reasons we have stated, does not fall within its range or application.

We need only add that nothing we have said is to be understood as affecting in any way the franchise conferred upon the relator by its charter to operate a street railway in Baltimore City; though the franchise can only be exercised

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in such mode as the city, which has absolute control over its own streets, may by reasonable regulations prescribe.

For the reasons we have assigned, the order appealed from will be affirmed with costs.

Order affirmed with costs.

(Decided April 4th, 1895.)

BRYAN, J., delivered the following separate and in part concurring opinion :

This was a petition for a *mandamus* addressed to the Court of Common Pleas. The relator in the petition is the Baltimore, Canton and Point Breeze Railway Company of Baltimore City, a corporation duly constituted and organized. The Mayor and City Council of Baltimore, by ordinance approved April 18th, 1892, granted permission to the relator to lay down and construct double iron railway tracks in certain streets of the city of Baltimore. These streets are designated in the first section of the ordinance. The tracks were permitted to commence on North Calvert between Fayette and Lexington, and to run eastwardly on Lexington, and over a number of other streets to the eastern limit of the city on O'Donnell street. The time for commencing and completing these tracks was limited in the twelfth section of the ordinance. As the construction of this section was earnestly debated at the bar, we think it proper to insert it in full ; premising that the relator is duly invested with all the rights granted to the persons therein described as "the said proprietors, their associates and assigns."

"And be it further enacted and ordained, that the said proprietors, their associates and assigns, shall commence the work of laying down and constructing the railway tracks aforesaid, within six months from the approval of this ordinance, and shall complete the said work and commence the regular running of cars within twelve months thereafter, otherwise the rights and privileges herein granted shall be

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null and void ; provided, that the provisions of this section shall not apply in case of delay caused by other parties, or in case any of the streets hereinbefore named may not have been graded and paved at the time of the approval of this ordinance, or should any of said streets be undergoing repairs by the city authorities in such manner as would interfere with the laying and constructing of the railway tracks aforesaid, then the time for the completion of said railways shall be extended for a period of twelve months from the removal of such delay or the completion of such grading and paving or repairs."

The petition for a *mandamus* alleged at the time of the approval of the ordinance a portion of Lexington street, on which the railway tracks were authorized, was not graded and paved, and that this grading and paving was not completed until the twenty-first day of October, eighteen hundred and ninety-three ; that a bridge over Jones' Falls, which the tracks were authorized to cross, was not completed prior to September twenty-third, eighteen hundred and ninety-three ; and that a portion of Canton avenue, forming a part of its route, is not yet graded and paved. The petitioner further alleged, that it did commence laying its tracks within six months after the approval of the ordinance.

It further alleged, that on the seventh day of June, eighteen hundred and ninety-four, it made application in writing to the City Commissioner for permission to tear up the streets for the purpose of laying its tracks ; and that the Commissioner and the Mayor refused to grant the permission, and made under their signatures the following endorsement on the application : "Permit refused, on the ground that the provisions of Ordinance No. 50, approved April 19th, 1892, were not complied with in such manner as would authorize the construction of the road under said ordinance." The prayer of the petition was for a *mandamus* requiring the Commissioner and the Mayor to approve the permission. By an ordinance of the Mayor and

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City Council of Baltimore (approved November 25th, 1892), it was enacted that no person or corporation should, under any pretext, or for any cause whatever, dig up any of the streets, lanes or alleys of the city, or remove therefrom any of the stones, bricks, blocks, cement or other material with which the same may be paved, in whole or in part, without having first obtained a written permit therefor from the City Commissioner, approved by the Mayor. The answer of the respondents maintained that the relator had forfeited whatever right it had to lay down the tracks, by its failure to perform the conditions on which the right was granted. After hearing, the Court below dismissed the petition for a *mandamus*, and the relator appealed to this Court.

The agreed statement of facts shows that on the seventh day of October, eighteen hundred and ninety-two, the relator laid thirty feet of the tracks of its railway on one of the streets designated as its route. It also shewed that at the time of the approval of the ordinance some portion of some of the streets, over which the track was to run, was ungraded and unpaved, and still is ungraded and unpaved. It also shewed that the Mayor had refused to give his approval of the tearing up the streets, because he believed that the relator had not complied with the provisions of the ordinance approved April 19th, eighteen hundred and ninety-two, and had not commenced the construction of the road within the time required by it, and had not completed it within the time so required. In the argument of the case, besides contending that the work on the road had been commenced in due time, the counsel for the railroad contended that by the true construction of the twelfth section of the ordinance it was not required to commence the work within six months after its approval, because some portions of the streets over which the tracks were to run were not at that time graded and paved. And it was contended that for the same reason the obligation to complete the road within twelve months after the approval of the ordinance

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was removed, and that it was not required to complete it until twelve months had expired after all the streets had been graded and paved which were ungraded and unpaved at the time when the ordinance was approved. Upon this basis it is maintained that the relator had the right to use the streets for the construction of its road, and that the Mayor, when he refused the desired permission, committed an error which the Court ought to correct by the writ of *mandamus*. Let us consider the nature of the duty which the Mayor was required to perform in this regard. The ordinance which requires the permit from the Mayor was not necessary to protect the streets from mere trespassers. The police force, in the ordinary discharge of its duties, was adequate to deal as effectually with them as with other law-breakers. But there are other persons of a far higher character who reasonably believe that they have a right to dig up the streets in the prosecution of their lawful business. It was not considered expedient that they should decide the question of right for themselves. The ordinance places the decision of the question, in the first instance, in the hands of the Mayor, by enacting that without his approval the streets shall not be torn up "under any pretext, or for any cause whatever." It does not enact, and could not competently enact that the Mayor's decision should control the judgment of the Courts in any suit where they should have jurisdiction of the question. But it imposes on him the duty of deciding whether, under given circumstances, it is proper that the streets should be dug up. He is required to decide the question for himself; the ordinance does not subject his judgment to the control of any other person, official or unofficial. In deciding whether he would approve the permit in the present case, he would necessarily determine whether the relator had a right under the ordinance to use the streets for its railways. To do this, he would be obliged to exercise his judgment in construing the twelfth section of the ordinance. He would be confronted with the question whether the laying of thirty feet of the tracks,

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and then stopping, was such a commencement of the work as was contemplated by the ordinance, or whether it was a merely illusory act. If he decided that this was not a real commencement of the work, he would then consider whether the ordinance should be interpreted as meaning that the limitation of six months for the commencement of the work was inapplicable, if any of the streets lying in the route of the railway were unpaved and ungraded at the time when the ordinance was approved. And he would also have to determine whether, under the same circumstances, the relator was relieved from the obligation to complete the work within twelve months. The duty of approving or disapproving the permit imposed on the Mayor, thus requiring the exercise of judgment and discretion, it cannot be controlled by the writ of *mandamus*. The authorities are uniform and consistent that it cannot issue in such a case, but only where the act is merely ministerial. In *United States v. Seaman*, 17 Howard, 225, the Supreme Court sums up its reasons why the writ should not issue against the respondent in that case, in these words: "He was obliged, therefore, to examine evidence, and form his judgment before he acted; and, whenever that is to be done, it is not a case for a *mandamus*." And it contrasted the case before it with *Kendall v. Stokes*, 12 Peters, 524, where a *mandamus* was issued against the Postmaster-General commanding him to enter in the books of the department a credit in favor of the relators, which had been ascertained and fixed by law, and to which the Court said their right ought to be considered as irreversibly established. Of this case, the Court, speaking of the Postmaster-General, said: "He was merely to record it. His duty, under that act of Congress, was like that of a Clerk of a Court, who is required to record its proceedings; or of an officer appointed by law to record deeds which a party has a right by law to place on record; or of the register of the treasury of the United States, to record accounts transmitted to him by the proper accounting officers, to be recorded. The duty in such cases

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is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a Court." After the repeated decisions of this Court to the effect that a *mandamus* will not issue in any case where discretion and judgment are to be exercised by a public officer, we do not think it any longer a subject for discussion. *Green v. Purnell*, 12 Maryland, 336; *Devine v. Belt*, 70 Maryland, 352; *Madison v. Harbor Board*, 76 Maryland, 398; *Wailes v. Smith, Comptroller*, 76 Maryland, 477, and many other cases.

The counsel for the relator argue that by the proper construction of section 12 of the ordinance of April 18th, eighteen hundred and ninety-two, it has the right to construct the road, and that, therefore, it was the Mayor's duty to approve the permit to tear up the streets. The inference is drawn that we ought to compel him to do so by *mandamus*. But, as the Mayor's judgment is to decide this question, we cannot entertain an appeal from his decision by means of this writ, and thus revise and reverse his determination. As a matter of course, if, in a case where we have jurisdiction, a suit involving the construction of the ordinance should come before this Court, we would not be bound by the Mayor's opinion, but would pronounce such judgment as we thought to be right. In *Decatur v. Paulding*, 14 Peters, 497, the widow of Commodore Decatur claimed a sum of money under a joint resolution of the Senate and House of Representatives. The Secretary of the Treasury, upon his construction of the resolution, in connection with an Act of Congress passed on the same day, decided that she was not entitled to the money; and thereupon she applied for a *mandamus* to compel him to pay her. The Supreme Court, after saying that the Secretary must exercise his judgment in expounding the laws and resolutions of Congress, under which he is required to act, proceeded as follows: "If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And, if they

Md.]

Syllabus.

supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Act of Congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties." For these reasons, I think that we must affirm the judgment of the Court of Common Pleas.

(Filed April 4th, 1895.)

**THE PRESIDENT, MANAGERS AND COMPANY
OF THE BALTIMORE AND FREDERICKTOWN
TURNPIKE ROAD *vs.* THE BALTIMORE, CA-
TONSVILLE AND ELLICOTT'S MILLS PASSEN-
GER RAILROAD COMPANY.**

*Eminent Domain—Condemnation of the Property of One Corporation
by Another—Constitutional Law.*

Property owned by a corporation is held subject to the power of eminent domain.

Where the law is constitutional, under which condemnation is sought, a Court of Equity has no power to arrest the proceedings by injunction, since a special tribunal is empowered to determine all the questions arising under the inquisition.

A railway company was authorized by an Act of the Legislature to construct and operate an electric railway upon the road of a turnpike company; to alter the grade of the road and change the location of tracks which the railway company was already operating as a horse

railway under a contract with the turnpike company; and the railway company was empowered to acquire the necessary easement and estate by condemnation. The turnpike company filed a bill to enjoin the prosecution of condemnation proceedings, after damages had been assessed by a jury, upon the ground that the statute was in violation of the Constitution of the United States. *Held*, that the Legislature had the power to determine when the grant to the turnpike company must yield to the grant made to another corporation for a public purpose, and that the railway company had the right to condemn the property of the turnpike company, including that embraced in its contract with the horse railway company, for the purpose of constructing the electric railway.

Appeal from a deeree of the Circuit Court for Baltimore County (FOWLER, C. J., and BURKE, J.), sustaining a demurrer to the bill of complaint in this case and dismissing the same. The bill sets forth, among other things, that the plaintiff derived its charter as a turnpike company under chapter 51 of the Acts of 1804, which Act is pleaded as a part of the bill, and under which it was vested with certain powers as to the maintenance of its road and the collection of tolls, forming an inviolable contract between itself and the State; that in the year 1861 it entered into an agreement with the Baltimore, Catonsville and Ellicott's Mills Passenger Railway Company, the predecessor of the defendant, for the use of a portion of its turnpike upon which to construct a horse railway; and that beside certain physical changes to be made in the bed of the turnpike and the construction of a bridge over Gwynn's Falls, all at the expense of the railway company, the said railway company, by way of toll for the use of said turnpike, agreed to pay a stipulated sum per annum; to be \$600 per annum from Baltimore City to Fairview Inn, and when the railway was completed as far as Catonsville, \$900 per annum, and if extended beyond said point at the additional rate of \$150 for every mile of turnpike road so used. And that said agreement further provided for a revision of the rate of toll every five years, upon request by either party, and also the mode and standard by which such revision should be made. That the railroad was constructed in pursuance of said

Md.]

Statement of the Case.

agreement, from Baltimore City to Catonsville, and the plaintiff collected its toll of \$900 per annum, for a number of years. That in the fall of the year 1866, the turnpike and the railroad were both greatly injured by a destructive flood, and an agreement was made between the companies for a temporary suspension of tolls, repairs, etc. That the railroad company was sold under a foreclosure of mortgage and reorganized under the name of the defendant, and the defendant had proceeded under the authority of the Act of 1894 to institute condemnation proceedings ; the application for the warrant and the inquisition both referring to the agreement of 1861, in these words :

"All other provisions of the agreement whereby the said Baltimore, Catonsville and Ellicott's Mills Passenger Railroad Company, as the successor of the Baltimore, Catonsville and Ellicott's Mills Passenger Railway Company, has authority to operate a horse passenger railway over said turnpike road, between Loudon Park Cemetery, in the city of Baltimore, and the point opposite the residence of Dr. MacGill, in the village of Catonsville, in Baltimore County, being left in full force and effect."

That, in the execution of said warrant and taking of the inquisition, which is now before the Court for confirmation, it was impossible to determine the bearing and scope of the clause cited, and it is now impossible to tell what rights of the plaintiffs are concluded by the inquisition, and whether said agreement will be in force as to the provision therein for payment of tolls, in case the inquisition is ratified, or whether the inquisition annuls it. That during the taking of said inquisition, the defendant, the railroad company, claimed that the agreement as to payment of tolls was not in force, and that the jury should not consider it ; and the contrary contention was made by the turnpike company. That the evidence submitted to the jury showed that the proposed changes to be made by the railroad would necessitate an outlay on the part of the turnpike at the rate of about \$5,000 per mile for the space of three miles, and the

verdict of the jury being for \$10,000 only, would indicate that they had not considered the provisions in the agreement of 1861, relating to the payment of tolls.

The bill asks that the Act of 1894 should be declared unconstitutional so far as the plaintiff is concerned; that the Court may interpose to construe the agreement of 1861, and ascertain, determine and enforce the plaintiff's rights thereunder; and that an injunction may issue to restrain the defendants from prosecuting its present inquisition, or any proceeding to acquire an easement and estate in plaintiff's road.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE and ROBERTS, JJ.

Arthur W. Machen and *D. G. McIntosh*, for the appellant.

The charter of the appellant is a contract between the State and itself, and the rights thereby acquired cannot be subsequently invaded, even by the State itself. *Constitution of U. S.*, Article 1, section 10; *Hans v. State of Louisiana*, 134 U. S. 20; *Pennoyer v. Connaughy*, 140 U. S. 18; *Penn. R. R. Co. v. B. & O. R. R.*, 60 Md. 268; *State v. N. C. R. R.*, 44 Md. 164; *Canal Co. v. Railroad Co.*, 4 Gill & Johnson, 109 and 144; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray, 1; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339. Among the chartered rights of the turnpike company is the right and power to grade the bed of its road as it may determine from time to time.

But the Act of 1894, chapter 162, compels the turnpike company to submit to its terms, or by condemnation proceedings have the *railroad company establish its own grade over that portion of the road occupied by it*, and without reference to the grade of the other part. This is in manifest violation of a right of the appellant to determine its own grades, and one which is vital to its existence. This case therefore, differs from the case of *West River Bridge against Dix*, 6 Howard, 506, relied on by the appellee in the Court below in this material respect.

Md.]

Argument of Counsel.

The Act of 1894 severs and divides the appellant's franchise, and it makes no provision for awarding compensation therefor. The use of electricity as a motive power, and the construction of double tracks by the railroad, provided for in the Act, means largely increased travel, and a proportionate increase in the number of cars transported along the turnpike, and subject to toll by the appellant. The right to exact toll constitutes the turnpike's franchise. It is a species of property distinct in law from the ownership of the road itself and other physical property. It is, in fact, the most important in value of all property owned by the turnpike company, and the roadbed would be worthless without it. The Act of 1894, if put into operation, by condemnation proceedings, must practically appropriate more or less of the franchise now enjoyed by the turnpike company, and work a condemnation of it to that extent. But it is submitted that no condemnation of a franchise can be had by piecemeal, even with legislative sanction. A franchise may be taken in its entirety and paid for, as was done in the *West River Bridge case*, but no authority can be found for dividing it up, or parcelling it out, or holding it in fragments, in different hands. *Balto., etc., Co. v. Union Ry. Co.*, 35 Md. 224; *Boston Water Power Co. v. Railroad Co.*, 23 Pick. 366.

In these cases, as well as the case of the *Richmond Railroad Company against The Louisa Railroad Co.*, 13 Howard, 71, and many similar cases, the ground of the decision was that while the construction of the new road or improvements, as the case may be, might incidentally occasion some injury to the franchise of the pre-existing corporation, as by the building of a lateral rival road, or the crossing of one line by the other; yet that the original franchise was preserved in its integrity, and all the rights enjoyed under it, could be exercised as well after as before the condemnation. In this case the passage of cars along and over the roadbed of the turnpike, and through its gates, without the accustomed incident of paying toll, not only affects and impairs

its value, but it divides the franchise itself, and puts the railroad company in possession of a portion thereof. And see—*Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 328–34; *Greenwood v. Freight Co.*, 105 U. S. 16, 17.

Apart from the question of power in the Legislature to impair the value of a franchise or to destroy its entirety, it is denied that the Act of 1894 authorizes the exercise of such power, or makes proper provision for ascertaining the extent of the injury and awarding compensation. The grant of power in the Act is, “to acquire the easement and estate in the turnpike necessary for the exercise of the rights mentioned;” the rights mentioned being to use electricity as a motive power on its railway, and to construct and operate double passenger railway tracks on the turnpike in the manner specified, and to change the grades and location of the tracks. Nothing is said about the taking of the franchise, or a portion of it, nor for the ascertainment by the jury of its value, and allowing compensation therefor; nor do the general provisions of the Code, Article 23, title “Condemnation of Property by Corporations,” supply the omission. The property of a corporation may be condemned in whole or in part, and the franchise still remains in the company. Or the franchise may be taken without regard to the property. , 35 Md. 224; *Worcester R. R. Co. v. Commissioners*, 118 Mass. 561. The Act here authorizes only the acquisition of an easement and estate in the turnpike road. There is no express grant of power to acquire the franchise, nor does it necessarily arise by implication. Upon the principle that the power exercised is extraordinary and against common right, there can be no such implication. *In re Boston & Albany R. R. Co.*, 53 N. Y. 574; *Alex. & F. R. R. Co. v. Alex. & W. R. R. Co.*, 75 Va. 780.

In the present case not only was an inviolable contract entered into by the State with the turnpike company, in the charter of the latter, but the turnpike company and railroad company made a valid contract with one another, and this latter contract was not only binding as between the parties,

Md.]

Argument of Counsel.

but the State was disabled from passing any law impairing its obligation. By that contract the railroad company acquired the right to construct a railway in a certain manner and under certain conditions, and to run cars upon it drawn by horses, and without authority to use any other motive power, in consideration of the obligation assumed by it to pay for such use, as particularly provided in the written agreement. By virtue of this agreement only the railroad company obtained entrance upon the turnpike road, constructed the railway in the manner authorized by the turnpike company, and was allowed to run its horse cars thereon. But for the privilege so conferred, the turnpike company would now be able to enter into an agreement with any other railway company, possessing adequate powers for the construction and use of a railway upon its road. The contract, however, is of mutual obligation. The use of the railway constructed upon the turnpike road in manner provided in the agreement is secured to the railroad company ; and the turnpike company is secured against any other kind of use of the turnpike road by this railroad company or its assigns. The railroad company may use horse cars on the railway constructed for that purpose, but, without the consent of the turnpike company, can use no other kind of power. Under the agreement, the turnpike may be graded, in a manner authorized by the turnpike company and applied to the entire surface of its roadbed, but is not to be otherwise graded. The Act of 1894, chapter 162, attempts to authorize the railroad company to violate this contract, to use electricity as a motive power upon the turnpike road without the consent of the turnpike company, as well as to change the grades of the road and disregard the contract obligation to pay an annual sum in lieu of tolls.

E. J. D. Cross and Geo. Dobbin Penniman (with whom was *Milton W. Offutt* on the brief), for the appellee.

BRYAN, J., delivered the opinion of the Court.

By the Act of 1894, chapter 162, the Legislature granted

to the Baltimore, Catonsville and Ellicott's Mills Passenger Railroad Company the right to use electricity as a motive power on its railway between Baltimore City and Catonsville and on an extension of it thereafter to be made to Ellicott City. By the same Act this corporation was empowered to construct and operate double passenger railway tracks on the turnpike of the President, Managers and Company of the Baltimore and Fredericktown Turnpike Road, with power to alter its grade, and to change the location of the tracks which it already had on the turnpike. And the two corporations were authorized to agree upon the terms and conditions on which these rights should be exercised; and in case they should fail to agree, the railroad company was empowered to acquire the necessary easement and estate by condemnation proceedings.

It is well known and it is stated in the proceedings in this case that by virtue of a contract with the turnpike company a passenger horse railway had been maintained and operated for many years on the bed of the turnpike between the city of Baltimore and Catonsville. It does not seem to be controverted that the property of the corporation which originally owned this horse railway was sold under a foreclosure proceeding, and that the present appellee (under a slight change of name), has been invested with all its rights, property and duties, and subjected to all its obligations. The appellee has prosecuted condemnation proceedings, and in due course the jury have found and assessed damages under their inquisition. Without entering minutely into details, it is sufficient to state that the appellant filed a bill in equity, in which it alleged that the above mentioned Act of Assembly is contrary to the Constitution of the United States, and it prayed that the appellee should be enjoined from proceeding under the inquisition and from prosecuting any proceedings whatsoever by way of condemnation to acquire any easement or estate in the turnpike road. The Circuit Court sustained the right of condemnation and the appellant took its appeal.

Md.]

Opinion of the Court.

The turnpike company was chartered by the Act of 1804, chapter 51, and under this Act it constructed its turnpike road, and has operated and maintained it from the time of its construction to the present day. There can be no doubt that the charter is a contract between the Legislature and the corporation, which is under the protection of the Constitution of the United States. And the same may be said of the contract made with the predecessor of the appellee in reference to the construction of the horse railroad. The Legislature has no power to amend, alter or impair any stipulation in either of these contracts. They must all be preserved inviolate in their original integrity. If the Act of Assembly infringes any right granted by the appellant's charter, or releases any stipulation contained in the contract, it must to that extent be declared null and void. And it has been declared by this Court that there is no difference in principle between a law that in terms impairs the obligation of a contract, and one that produces the same effect in the construction and practical execution of it. *Canal Company v. Railroad Company*, 4 Gill & Johnson, 109. In the same case, at pages 144 and 145, it was said that a franchise, a corporate right to select and acquire land for the authorized purposes of the corporation, is property ; "it is an incorporeal hereditament ; not a legal title to the land itself ; not a mere capacity or faculty to acquire and hold land, such as every individual possesses ; but, in addition to such capacity, it is a right or privilege, a portion of the eminent domain vested in the corporation to acquire the legal title to land, subjected by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament ; and after the franchise to choose and condemn land for any particular public purpose that portion of the eminent domain granted and subsisting in one corporation, can not be bestowed upon another, to the prejudice of the former grant ; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and

enjoyment of its franchise." Therefore the Legislature could not take away from the appellant the unrestricted right to the control and use of its road, and donate any portion of this right to the appellee. But there is a vital essential and paramount power belonging to the State which has never been surrendered to the General Government, and which is not limited or embarrassed by any considerations inferior to a regard for the public welfare. It is the right of eminent domain, or the right to take private property for the public use, with just compensation previously paid or tendered to the owner. The Legislature has the right to determine when private property shall be thus taken, and the duty devolves on the Courts to protect the rights of the owner by enforcing just compensation before it is taken. Whatever doubts may have existed at one time on the question, and it is probable they did exist when the case of the *Canal Company* was decided, it is now settled by authority which this Court is bound to obey, that "the grant of a franchise is of no higher order, and confers no more sacred title than a grant of land to an individual, and, when public necessities require it, the one, as well as the other, may be taken for public purposes, on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts." *West River Bridge Co. v. Dix*, 6 Howard, 507; *Richmond Railroad Company v. Louisa Railroad Co.*, 13 Howard, 83. As was natural and proper these decisions have been followed in the opinions delivered by the State Courts. We forbear to cite any of them, inasmuch as we consider that the Federal authority marks out the course for us to follow, independently of any other consideration. It has been said by the Supreme Court that the power to take private property for public use "reaches back of all constitutional provisions." *Pumpelly v. Green Bay Company*, 13 Wallace, 178. It has also been said on this subject that a grant made for one public purpose must yield to another more urgent and important. Of course, it rests with the Legislature to deter-

Md.]

Opinion of the Court.

~~mine~~ when the necessity arises for making one public purpose subordinate to another which it regards as of a higher degree of utility. It is, of course, not held by any Court that the Legislature can bestow the property of any person, natural or corporate, upon another, but that private property cannot be exempted from the supreme right of eminent domain, on the ground that it is held by a chartered right. And, of course, the same must be said in cases where it is held by virtue of a private contract. We therefore feel obliged to hold that the Act of 1894, chapter 162, constitutionally conferred on the appellee the right to condemn the corporate property and franchises of the appellant, including such as were embraced within the scope of the ~~contract~~ act in reference to the horse railway.

The statute law prescribes the mode in which the condemnation must be pursued. After the inquisition has been reduced to writing, and signed and sealed by the jury, it is required to be returned to the Circuit Court of the county, which is invested with the jurisdiction to confirm it or to set it aside. The value of the appellant's property and franchises will be very greatly diminished by the proceedings under this Act of Assembly; but for the injury thus done, including all damage which may be sustained by the seizure of its property, and any loss which may arise from an impairment of the value of its contract rights, it is the duty of the jury of inquisition to assess adequate compensation. The whole proceeding is subject to the power and control of the Circuit Court, which is the tribunal appointed by the law to afford redress where injustice has been committed by the jury. It is also its duty to see that the inquisition is regularly and properly conducted, and that the rights of the parties are duly protected. It is not competent for any other Court to exert this jurisdiction. It is held that where the law is constitutional, under which condemnation is sought, a Court of Equity has no power to arrest the proceedings by injunction; because a special tribunal is established for supervising the exercise of the right of eminent

domain, to which alone the power has been granted to hear and determine all questions which can arise regarding the inquisition. *Western Maryland R. R. Co. v. Patterson*, 37 Maryland, 125; *Unreported Case of Same v. Keerl*, decided at the same time; *C. & P. R. R. Co. v. Pennsylvania R. R.*, 57 Maryland, 267.

We think that the decree below ought to be affirmed.

Decree Affirmed.

(Decided April 19th, 1895.)

CHARLES H. CLASSEN AND LYDIA H. HOWARD
vs. THE CHESAPEAKE GUANO COMPANY.

Wharves and Piers—Right to make Improvements into Navigable Water—Vested Rights to Wharves Under Ordinances.

The municipal corporation of Baltimore City is empowered by the Legislature to establish the lines within which wharves may be built or improvements made into navigable waters within the city limits.

Where a party is authorized by a municipal ordinance to build out certain piers to the Pier Head Line, and such right has not been exercised before the passage of a subsequent ordinance establishing different lines within which piers may be built, the latter ordinance is a revocation of the privilege granted by the former.

Plaintiff and defendant were owners of adjoining lots of ground fronting on navigable water, in the city of Baltimore, at a point where the shore is concave. In 1880 the defendant was authorized by ordinance to erect a solid wharf in front of his lot the full width thereof, to the Bulkhead Line, and also two piers from the Bulkhead Line to the Pierhead Line. Defendant erected the wharf, but did not build said piers. In 1881 another ordinance was passed, which was accompanied by a map, establishing the lines within which permits for pier or bulkhead extensions should be granted to the owners of lots on this shore. According to the lines thus established, a part of defendant's solid wharf was within the lines allotted to the plaintiff on the Bulkhead Line, and the piers authorized by the ordinance of 1880, if constructed, would be almost wholly within the Pierhead Lines of plaintiff's lot. Plaintiff claimed that defendant was a tres-

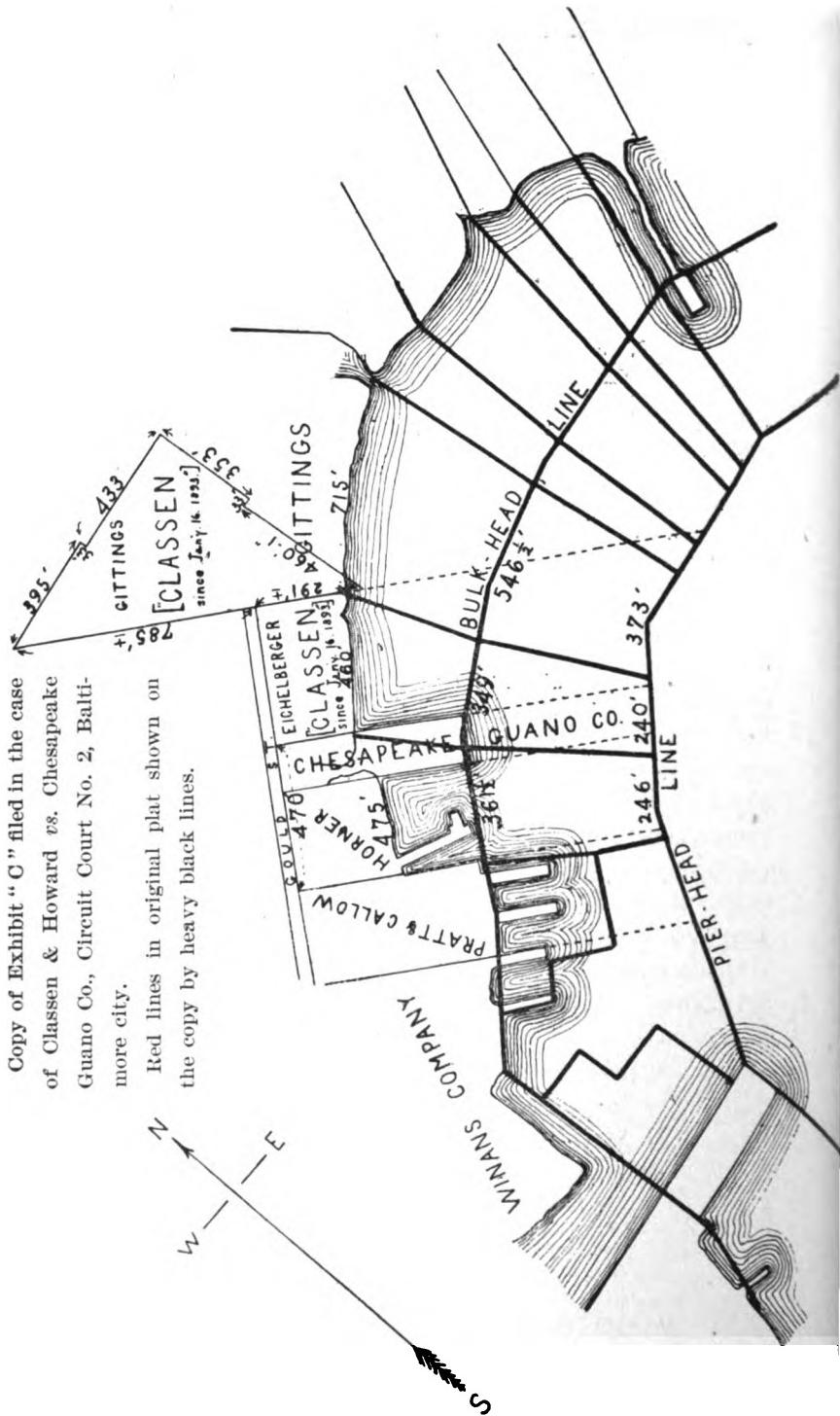
Md.]

Statement of the Case.

- passer so far as the wharf was concerned, and that defendant should be enjoined from erecting said piers. *Held,*
- 1st. That defendant was entitled to maintain his wharf to the Bulkhead Line, since the privilege to erect it became a vested right by having been acted upon before the passage of the second ordinance.
- 2nd. That the plaintiff was entitled to an injunction to restrain the erection of piers by the defendant beyond the Bulkhead Line, since the privilege to do so, given by the ordinance of 1880, was subject to revocation before being acted upon, and the ordinance of 1881 was a revocation thereof.
- 3rd. That the defendant now has a right to build piers to the Pierhead Line, taking so much of that line as is allotted by the map of 1881 to the plaintiff, as is in proportion to the defendant's acquired right on the Bulkhead Line; and that plaintiff's right to the Pierhead Line is to be measured by his frontage on the Bulkhead Line according to the map, diminished by so much thereof as is occupied by defendant's wharf.

Appeal from a *pro forma* decree of Circuit Court No. 2, of Baltimore City, by which it was adjudged that "the defendant has a right to maintain its bulkhead as at present constructed within the line, constituting the southeast boundary of defendant's property, extended by a straight line southeasterly to the bulkhead line, and for the purpose of constructing piers, has the right to extend the line now constituting the southeast boundary of the defendant's lot, in a straight line southeasterly, until it reaches the Pierhead Line laid down upon Plat No. 4, of the maps referred to in Ordinance No. 83, of the ordinances of 1881, approved May 17th, 1881. And that the plaintiffs are not entitled to an injunction."

The plat referred to in this decree is as follows:



Argument of Counsel.

The cause was submitted to the Court below upon a special case stated under the 47th General Equity Rule, which set forth the titles of the parties to their lots, and the various ordinances of the Mayor and City Council of Baltimore, referred to in the opinion of this Court, and the Court was asked to determine whether the erection of part of the bulkhead upon the southeasterly side of the red line laid down in "Exhibit C" constitute a trespass, and as to whether a perpetual injunction will be granted to prevent the defendant from erecting piers, or otherwise using any property within what is herein claimed to be the plaintiff's lines, as laid down in said plat, "Exhibit C," and enjoining and requiring the removal of the bulkhead erected on behalf of the defendant, in so far as it has been constructed within what are herein claimed to be the plaintiff's lines.

The cause was argued before ROBINSON, C. J., McSHERRY, BRISCOE, PAGE and ROBERTS, JJ.

George R. Willis and *Charles Morris Howard* for the appellant.

The right of the State Legislatures to establish wharf or harbor lines is too well established to cause any doubt. *State v. Sargent*, 45 Conn. 358; *Commonwealth v. Alger*, 7 Cush. 81.

The mere establishment of a harbor or dock line is not an abandonment of the right of the State to control and regulate the waters within the line. *Webber v. Harbor Commissioners*, 18 Wall. 57; *Wilson v. Inloes*, 11 G. & J. 351; *Gould on Waters*, 2d edition, sec. 138. In defining the exact limits of the rights of the riparian proprietor at common law, on navigable tidal streams, there was found to be considerable diversity of opinion among Courts of high authority, as well as among the writers upon the subject. *Garritee v. M. & C. C.*, 53 Md. 432. The Legislature alone has the right to determine whether, and to what extent, the public convenience requires an interruption of the public

Argument of Counsel.

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right of navigation. *Gould on Waters*, section 139; *Commonwealth v. Breed*, 4 Pick.; *Cape Elizabeth v. County Commissioners*, 64 Maine, 456.

Since 1745 there has been State wharf legislation with reference to the owners of shores along the water front in the city of Baltimore. The Act of 1745, chapter 9, section 10, which Act was supplemental to the Act of 1732, incorporating Baltimore Town, provided that "All improvements, of any kind whatsoever, either wharves, houses or other buildings, that have or shall be made out in the water, or where it usually flows, shall (as an encouragement to such improver) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns, forever." Notwithstanding these strong expressions, the Court of Appeals of Maryland has held repeatedly that this Act does not create a vested right or an irrepealable grant, but it is a legislative privilege, which, unless acted upon and enjoyed, is repealable. *Casey v. Inloes*, 1 Gill. 430; *McMurray v. Baltimore*, 54 Md. 110; *Dugan v. Baltimore*, 5 G. J. 225; *B. & O. R. R. Co. v. Chase*, 43 Md. 23; *Harrison v. Sterett*, 4 H. & McH. 550; *Hazlehurst v. Baltimore*, 37 Md. 215; *Horner v. Pleasants*, 66 Md. 477.

It will be easily seen that the regulations laid down by the Mayor and City Council in the ordinance of May 17, 1881, under the authority of the Legislature, are much more definite, and, therefore, more just and equitable than the earlier provisions of the Act of 1745, chapter 9, and the Acts supplemental to it. The ordinance and surveyor's plats, which are a part of it, define with mathematical precision the lines within which the shore owners have the right to build bulkheads or piers. Previous to the ordinance there was no general legislation defining with accuracy the direction which the improvements should take. From the case of *Baltimore and Ohio R. R. v. Chase*, 43 Md. 23, it would seem that the Act of 1745, chapter 9, together with the Acts providing for the establishment of Port Warden's Lines, determined the extent of the improvements which

Md.]

Argument of Counsel.

might be made, but not the direction of such improvements nor the boundaries between the respective shore-owners. While the right of the shore-owner to improve out from his property at a right-angle to his shore line is entirely just where the shore line happens to be a straight line, it is manifestly unjust where the shore line is concave, and if allowed might result in permitting the first occupant to encroach upon the natural boundary of his adjacent neighbor, and crowding him out (as it is sought to do in this case), leaving him without water-rights, and thus depriving his property of its value.

In 1876, the City Council passed a resolution (see Resolution No. 185, of April 22, 1876), directing the law officers of the city to give the "proper legal notices to all persons, firms, corporations * * * engaged in erecting piers * * * to discontinue all operations in that direction until plans, plats or diagrams of the proposed structure shall have been filed * * * and approved by the Mayor and City Council and permission be granted to erect the same in accordance with section 9." It is a part of this case, that, when the defendants erected their wharf or bulkhead, no plan of said wharf or bulkhead was laid before the Mayor and City Council, or any person authorized by them, nor was the consent of the Mayor and City Council, nor of the Joint Standing Committee on Harbor and the Mayor obtained to erect said wharf. It will thus be seen that the provisions of the laws above referred to have been violated by the defendants.

Ordinance No. 141, of October 6th, 1880, as well as the ordinance of June 8th, 1876, which it had repealed, enacted that said piers might be removed at any time after twelve months' notice by the Mayor, and that the expenses of said removal should be borne by the beneficiaries of the privilege. It is perfectly apparent, therefore, on the face of the ordinance, that no vested right was intended to be given, and that even if piers had been constructed under its authority, they might have been removed and the pier lines of shore-

owners might have been re-adjusted. This being the case, the third section of the ordinance of May 17, 1881, which repeals all ordinances or parts of ordinances inconsistent with its provisions, and gives it effect from the date of its passage, would clearly leave the defendant without any legal warrant for the proposed action of building piers outside the lines prescribed for him by that ordinance.

Frank Gosnell (with whom was *T. M. Lanahan* on the brief), for the appellee, cited: *Dugan v. M. & C. C. of Balto.*, 5 G. & J. 367; *Wilson v. Inloes*, 11 G. & J. 351; *B. & O. R. R. Co. v. Chase*, 43 Md. 23; *M. & C. C. of Balto. v. St. Agnes Hospital*, 48 Md. 421; *Garritee v. M. & C. C.*, 53 Md. 432-436; *Horner v. Pleasants*, 66 Md. 475; *Yates v. Milwaukee, &c.*, 10 Wall. 504, 508; *Railway Co. v. Rennick*, 102 U. S. 180, 183; *St. Louis v. Meyers*, 113 U. S. 567; *Yesler v. Washington Harbor Line Commissioners*, 146 U. S. 646, 656; *Dashiell v. Baltimore*, 45 Md. 622, *Appeal Tax Court v. Patterson*, 50 Md. 375.

BRISCOE, J., delivered the opinion of the Court.
The appellants are the owners of a lot of ground fronting on the Patapsco River, in the city of Baltimore, and the appellee is the owner of the adjoining lot on the west, likewise fronting on the river. The shore line of the river is concave, so that if some of the riparian owners should build out wharves or piers in straight lines the full width of their lots to the Pierhead, or Port Warden's Line, other riparian owners would be deprived of the privilege of building piers to the Pierhead Line, since the water front on the Pierhead Line is much less in extent than the shore line in the rear.

In 1876, Joshua Horner, who then owned the appellee's lot, and also the lot now adjoining on the west, was authorized by the Mayor and City Council, by Ordinance No. 114 of that year, to erect a bulkhead and piers in front of his lot. By Ordinance No. 141 of 1880, approved October 6, 1880, the ordinance of 1876 was repealed and re-enacted,

Md.]

Opinion of the Court.

to grant permission to the heirs of Joshua Horner to erect said bulkhead and piers.

The heirs of Horner, in August, 1880, agreed to sell to the appellee a portion of the lot referred to in these ordinances, fronting 150 feet on Gould street, and running to the Port Warden's Line, and, as a part of the consideration, agreed to build a solid bulkhead to the bulkhead line. And this bulkhead was constructed under the above-mentioned ordinance between October 6th, 1880, and January 6th, 1881, extending the whole width of the appellee's lot, and running out in straight lines to the bulkhead line.

Subsequently Ordinance No. 83 was passed and approved on May 17th, 1881, establishing certain pier and bulkhead lines in the harbor of Baltimore City. It recites in its preamble that, "Whereas it has become evident that further legislation is necessary to enable the Mayor and City Council, with equity to the riparian owners and to the public interest, to grant permits for pier or bulkhead extensions in such portions of the harbor as the shore line may be concave or hollow, or where it forms sharp re-entrant angles, so that the water front, measured on the pier or bulkhead lines, is much less in length than the shore line in the rear," and then enacts as follows: "That, from and after the passage of this ordinance the lines marked and shaded in 'red' in the maps numbered from 1 to 5, submitted this day by the Joint Standing Committee on Harbor, be and are hereby declared to be the pier and bulkhead lines, beyond which no extension of piers or bulkheads shall be made in the portions of the harbor to which said maps relate."

Now, it appears that the southeast part of the appellee's solid bulkhead, or wharf, is within the lines of what would be appellant's lot if extended according to the ordinance of 1881, and that the piers authorized in front of the appellee's lot by the ordinance of 1880, would be, if constructed almost wholly within the lines of the appellants' lot extended to the Pierhead or Port Warden's Line. And upon the case as thus stated the Court was asked to declare

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the erection of the appellee's bulkhead a trespass and to enjoin it from constructing piers to the pierhead line.

There can be no question, it seems to us, that the appellee has the right to maintain its wharf or bulkhead in front of its lot to the bulkhead line. The Patapsco River in the city of Baltimore is a navigable stream, and the power of the Legislature, or of the municipality under its authority, to establish the lines within which wharves may be built or other improvements made into the water cannot be disputed. *Brown v. Kennedy*, 5 H. & J. 195; *Hess v. Muir*, 65 Md. 586. In the case of *B. & O. R. R. Co. v. Chase*, 43 Md. 23, this Court said, that by the construction of the Act of 1745, chapter 9, sec. 10, as settled by the decisions of our predecessors, the right of the lot owner, fronting on the water, to extend his lot or improve out, to the limit prescribed by the authorities of the city, is a franchise, a vested right peculiar in its nature, but a *quasi* property of which the lot owner cannot be lawfully deprived without his consent. And if any other person without his authority make such extension, no interest or estate in the improvement vests in the improver, but it becomes the property and estate of the owner of the franchise. And in *Horner v. Pleasants*, 66 Md. 475, it was distinctly held that where a wharf is built by a riparian owner under a statute authorizing such improvement he is entitled to the perpetual use of the land covered by water for the wharf. But under statutes now in force in Baltimore City, the Mayor and City Council are authorized to prescribe the extent and mode within which riparian owners may make improvements in front of their lots, and when they bound upon a concave shore to declare what the front of a particular lot shall comprehend upon the Bulkhead or Port Warden's Line. *Balto. City Code*, Articles 343 and 351. Now, in this case, the wharf of the appellee, built out to the bulkhead line, was actually constructed prior to the ordinance of 1881, and under the ordinance of 1880, and the right of the appellee to maintain it cannot now be questioned by the appellants.

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We come now to the second question, as to the right of the appellee to build the piers authorized by the ordinance of 1880, to the pierhead line. It will be observed that no piers were erected during the time the ordinance of 1880 was in force, nor down to the institution of this suit.

It is contended by the appellee that the ordinance of 1881 "does nothing but define the pier and bulkhead lines, the reasonable interpretation of which is that the heavier lines marked Bulkhead Line and Pierhead Line are the lines meant to be established." But we think when this ordinance is considered in connection with the preamble and the map ordered it to be placed on file in the office of the Harbor Board, it is clear that its design was to give each of the owners along this concave shore a right to so much of the bulkhead and pierhead lines in front of their respective lots, as is comprehended within the red lines on said map, traversing in a southerly direction the bulkhead line. The effect of this ordinance was to abrogate, so far as these parties are concerned, any right which the appellee may have as the elder grantee and to give all these riparian owners equal rights to make improvements within the lines prescribed by the ordinance to the Pierhead or Port Warden's Line.

But it is manifest since the right to build piers beyond the bulkhead line conferred by the ordinance of 1880, has not been exercised, the appellee has no vested right in the same. It was a privilege subject to revocation at any time before it was acted upon, and the ordinance of 1881, which repealed all ordinances inconsistent therewith was a revo-
cation of this privilege. *Casey v. Inloes*, 1 Gill, 430; *Giraud v. Hughes*, 1 G. & J. 249; *Linthicum v. Coan*, 64 Md. 453. The appellants were therefore entitled to an injunction restraining the appellee from constructing piers beyond the bulkhead line, according to its contention, as being in front of the appellant's lot.

And to allow the appellee in this case to improve out in a straight line, the shore line being concave, would permit

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it to shut off and almost entirely deprive the adjacent lot owners, the appellants here, of water frontage and rights on the Pierhead or Port Warden's Line. Inasmuch, however, as the appellee acquired, by building its wharf under the ordinance of 1880, a vested right to a part of the bulkhead line, which has been allotted by the ordinance of 1881 to the appellants, the Chesapeake Guano Company now has a right to build piers to the pierhead line, taking so much of the pierhead line in front of the appellant's property (as laid down in the plat), as will bear the same proportion to the whole of said line, as the part of the bulkhead line acquired by the appellee bears to the whole bulkhead line in front of the appellant's property, such piers to be built according to the converging lines, in the direction of the lines laid down in the ordinance of 1881.

And the right of the appellants to extend to the pierhead line is to be measured by their proportion of frontage of the bulkhead line, diminished by that part occupied by the wharf of the appellee.

It follows, then, that the *pro forma* decree appealed from will be affirmed in part and reversed in part, and the cause remanded to the end that a decree may be passed in conformity with this opinion. Each party to pay one-half of costs in this Court and the Court below.

*Decree affirmed in part and reversed
in part. Each party to pay one-half
of costs.*

(Decided April 19th, 1895.)

Md.]

Syllabus.

JOHN D. KEILEY, JR., *vs.* JOSEPH J. TURNER, JR.,
AND THE SAFE DEPOSIT AND TRUST CO., EXEC-
UTOR OF JOSHUA J. TURNER, SR.

Partnership Accounts—Secret Agreement Between Two of Three Partners as to Salary—Appropriation of Partnership Property by One Partner Upon Dissolution—Interest.

Upon the formation of a partnership between A, B and C, it was agreed between A and B (who contributed the capital) that A should receive a salary of \$450 per month, but upon the books of the firm A and C were each credited with \$300 per month and B with \$150 per month; and A received for some time the amount credited to B. The other partner, C, was ignorant of this agreement between A and B. Upon a bill for an account, filed by A after the dissolution of the firm, *Held*, that, as against the firm assets, A was entitled only to the sum of \$300 per month, while as to the additional sum of \$150 per month, his recourse was only against B.

In the above case the partnership was dissolved in December, 1882, but there were no entries of salaries on the books of the firm after August 1, 1881, at which time the bookkeeper was directed to discontinue the same as to all the partners. There was then an agreement between A and B, unknown to C, that A's salary was to continue as previously. *Held*, that in this case A was not entitled to claim any salary after August 1, 1881.

It was stipulated in the articles that salaries should be paid out of the funds of the partnership, and should not be considered as losses. A allowed a portion of his said salary as partner to remain in the firm and be used for its benefit. *Held*, that he was entitled to interest on each month's salary as it became due, in the same manner that interest was allowed semi-annually to B on his contribution to the capital of the firm.

Upon the dissolution of a firm composed of A, B and C, the stock of merchandise on hand was taken possession of by B, who charged himself with it at a valuation fixed by himself and C. Some of the merchandise was shipped by B to New Orleans, and a loss was sustained on the shipment, owing to the failure of the purchasers to pay for it. Upon a bill by A for an account of the partnership affairs, *Held*,

1st. That A was entitled to his share of the true value of the property at the time it was appropriated by B, such appropriation having been

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made with his consent, and that he had no concern with the subsequent appreciation or depreciation in the value of the property.

2nd. That the merchandise shipped to New Orleans, having been insured at a certain rate, and it being shown that it was customary in insuring such cargoes to add ten per cent. to the invoice cost, it could be assumed in this case that the value of the cargo was the amount insured, less ten per cent., and this amount should be charged to B as a fair price for the property at the time he took it into his possession.

Appeal from a decree of the Circuit Court of Baltimore City (DENNIS, J.) The bill in this case was filed on February 28, 1885, by the appellant, John D. Keiley, Jr., against Joshua J. Turner and Joseph J. Turner, Jr. Its object was to procure a decree for an account of the affairs of the dissolved firm of J. J. Turner and Company, composed of the appellant and J. J. Turner, Sr. and J. J. Turner, Jr. Subsequently J. J. Turner, Sr., died, and the Safe Deposit and Trust Co. of Baltimore, his executor, was made a party defendant.

The testimony showed that the co-partnership was formed on March 19, 1878, and was to last for three years. Upon the expiration of the term of three years, it was renewed upon a verbal arrangement upon the same terms, and it was formally dissolved upon December 31, 1882.

The stipulation in the articles of partnership, as to salaries, is stated in the opinion of the Court. The salaries entered on the books to the several members of the firm were as follows: J. J. Turner, Sr., one hundred and fifty dollars per month; Mr. Keiley, three hundred dollars a month; and Joseph J. Turner, Jr., three hundred dollars a month. Mr. Keiley claims, however, that in reality, J. J. Turner, Sr., was to receive no salary, but that the one hundred and fifty dollars per month with which he was to be credited on the books were, by virtue of a private arrangement between him and J. J. Turner, Sr., to be paid to him. Joseph J. Turner, Jr., under this arrangement, was not to be informed of the inequality between himself and his brother-in-law, Mr. Keiley, in order to prevent jealousy on the part of J. J.

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Turner, Jr., whom, Mr. Keiley says, J. J. Turner, Sr., mistrusted, and for fear that if such inequality had been made known to him, he would not have become a partner in the firm.

On December 31, 1878, Mr. Keiley ordered the book-keeper to enter salaries to the credit of the several members of the firm, at the rate, from the beginning to that date, of one hundred and fifty dollars a month to J. J. Turner, Sr.; three hundred a month to Mr. Keiley, and three hundred a month to J. J. Turner, Jr., and so they were regularly entered thereafter down to August 1st, 1881, on the books of the firm.

When a discussion about the dissolution of the firm, as of the first of August, 1881, began, all the salaries to all the partners were stopped, and from that time down to the dissolution of the firm on December 31, 1882, no salaries were credited on the books to any of the partners. The order to discontinue them was given by Mr. Keiley, to the bookkeeper, and J. J. Turner, Jr., assented to the stopping of the salaries. The plaintiff offered evidence to show that this discontinuance was done under a private agreement between himself and Turner, Sr., in order to prevent over-drawing by Turner, Jr., but that in reality the plaintiff, Keiley, was to be entitled to his original \$450 per month.

When the case was first argued below, the counsel for the appellees contended that the adjustment of the account on the books of the firm was correct, and that all Mr. Keiley was entitled to was the amount of \$2,433.31, which had been tendered to him in October 1890. The ground of this contention by the appellees was that upon the dissolution of the firm on December 31, 1882, J. J. Turner, Sr., carried over to himself, as the settling partner, all the undisposed of merchandise belonging to the firm at certain prices, charging himself with these prices, which, it was insisted, was the full and fair market value of this undisposed-of merchandise. Charging himself with all this merchandise at these prices, a balance was shown to be due to Mr.

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Keiley, which Mr. Turner was ready to pay, and which his executor tendered to Mr. Keiley in October, 1890. Mr. Keiley contended, however, that, inasmuch as he had not consented to this transfer of the undisposed-of merchandise of the firm to Mr. Turner at prices fixed by him, he, Mr. Keiley, was entitled to his share of the net proceeds of what was actually realized from such undisposed manufactured merchandise when sold by J. J. Turner, Sr., or the succeeding firm of J. J. Turner & Co. The Court below sustained the contention of Mr. Keiley in this particular.

There was conflicting evidence as to the amount of phosphate belonging to the firm taken over by Turner, Sr., as liquidating partner, and shipped to New Orleans, and as to the value of the same. The Court below found that the amount was 510 tons of phosphate. This was shipped by Turner to New Orleans, and the total loss on the shipment was \$10,004.33, of which Keiley's share was \$3,334.68.

The Court below held that the plaintiff was bound to stand his proportion of this loss ; that he was entitled to salary at the rate of \$300 per month from March 19, 1878, to August 1, 1881, and passed a decree against the plaintiff for \$900.22, with interest from January 1st, 1881.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE and BOYD, JJ.

Charles Marshall and Edgar H. Gans for the appellant.

The questions for this Court to determine, without going into the figures, are as follows : 1. What salary is to be allowed the appellant ? 2. What amount of merchandise was taken over by J. J. Turner, Sr.? 3. How is the value to be ascertained? The answer of the Court to these questions will enable any Auditor to state an account showing the amount due the appellant.

I. *Salary.* The question of salary has four points of controversy : 1. How long is it to run ? 2. What is the amount per month ? 3. Can any part of salary be charged

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against appellant as a loss of the business? 4. Is interest to be allowed on it? These questions are mainly to be answered by a proper construction of the articles of co-partnership. That these articles constitute the true agreement of the parties is shown by the answers of the respective defendants. It is true that the plaintiff states in his bill that three copies of the articles were signed, and that the copies retained by him and Joshua J. Turner, Sr., contained an allowance of \$450 per month salary to the appellant, and \$300 per month to Joseph J. Turner, Jr., whilst the copy given to Joseph J. Turner, Jr., contained a salary of \$300 per month to the appellant, \$300 a month to Joseph J. Turner, Jr., and \$150 per month to Joshua J. Turner, Sr., which were, in fact, the amounts entered up in the books. The object of doing this is also explained in the bill to be a method of preventing the family jealousy that might arise, if J. J. Turner, Jr., thought that the appellant was getting more salary than he was. The \$150 per month, however, credited on the books to Joshua J. Turner, Sr., was only formal as to him, and in reality belonged to the appellant. Now, it is apparent that, though these allegations in the bill furnish an explanation of the reason for nominally crediting Joshua J. Turner, Sr., with \$150 per month salary, the real agreement was that the appellant was to receive \$450 per month, Joseph J. Turner, Jr., \$300 per month, and Joshua J. Turner, Sr., nothing, as salary. This is the real agreement alleged in the bill as to the *right* to the salaries, and is admitted in the answers of both defendants.

Again, when these salaries become due each month, the parties of the second and third part would have a perfect right to draw out the money and invest it in any interest-bearing security. As a matter of fact, it appears that the appellant allowed his salary simply to be credited from month to month, just as Joshua J. Turner, Sr., allowed his interest to be credited semi-annually. And, therefore, just as the accounts show that Joshua J. Turner, Sr., was allowed interest on these semi-annual credits, so also should the

appellant be allowed interest on his monthly credits of salary and on any other capital which he paid into or allowed, in the shape of yearly profits, to remain in the concern. For those become contributions by him to the capital stock.

But it is urged that this understanding between Turner, Sr., and the appellant, that salaries were not to be credited after May 1, 1881, was a fraud on Joseph J. Turner, Jr., as he was led to believe that the salaries had ceased, and acted accordingly. We answer: 1st. That it is irrational to charge fraud against a father, because of an arrangement, whose only object was to protect the son against the consequences of his own extravagance. 2d. That as there was no real agreement to stop the salaries between Turner, Sr., and the appellant, Turner, Jr. can not insist now that there was such an agreement, merely because he was made to believe that such agreement was made; unless, perhaps, he was fraudulently mislead to his prejudice. 3d. Turner, Jr., could not be and was not prejudiced. His claim to salary is just as good as that of the appellant. And finally, it appears from the accounts in the case, that there was no profits in the business in 1881 and 1882. If no profits, then the salary claimed by the appellant would be paid exclusively by Turner, Sr., and Turner, Jr., would not contribute anything thereto nor lose anything by its being paid. The only possible result would be to give him a claim for salary which he thought he did not have. Therefore, instead of being injured by this alleged fraud, he is benefited.

The appellant is therefore entitled to \$450 per month, salary from March 19, 1878, to January 1, 1883, with interest. Statement 2 of Account E, which was ratified by the Court, is consequently erroneous in the matter of salary, as it allows appellant only \$300 per month, from March 19, 1878, to August 1, 1881, without interest.

2. As to the New Orleans shipment, the Court below says: "The manufactured goods on hand at the time of the dissolution of the partnership were taken by Mr. Turner at the cost prices of the raw material which composed

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Argument of Counsel.

them. I do not think this was right. These goods, in their manufactured state, were worth more than when in the form of raw materials. The labor of manufacture, the reputation of the brand and the prepared form in which they were ready to be put on the market—all these elements went into their value, increasing it above that of the raw materials." The Court thought that the plaintiff was entitled to his portion of the net profits realized on the sale.

The matter was again referred to the Auditor, and evidence was taken by the appellees, tending to show that the goods were sent down to New Orleans, to be there sold, and in the event an extensive loss of \$12,163.35 was sustained, and now the appellees make the astonishing proposition that the appellant must stand one-third of this loss. Upon what possible theory could the appellant be chargeable with the loss on this cargo? In one aspect of the case, Turner, Sr., in taking these goods, even in liquidation, without consulting his co-partner, the appellant, upon prices fixed by himself, could be regarded as a wrongful taker and holder of the goods, as a trustee *ex maleficio*. In that character he would undoubtedly be liable to the true owner of the goods for any profits which he might make; and that was the whole extent of the contention below; but certainly he could not recover from the person he had wronged any loss which he himself sustained in any subsequent handling of the goods. He is at all events liable to the true owner for the real value of the goods, and his liability may be increased if he makes any profit out of the wrongful transaction.

The appellee's construction of the Court's ruling is a genuine *reductio ad absurdum*. Thus: Turner, Sr., took 510 tons of phosphate at \$22 per ton, total \$11,220. The Court says that this is only the cost of the raw material, and we are entitled to more than that. Turner, Sr., then ships these 510 tons to New Orleans, and after spending a great deal of time in selling them, sustains a loss of \$10,000. Now, the appellees argue that the goods taken by Turner, Sr., and which the Court said were worth more than \$11,220, are really worth \$10,000 less than nothing.

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It cannot be contended that the partnership continued as to these goods. The proof shows that they were shipped in the name of J. J. Turner, Sr.; that they were entered on the books of the subsequent firm as assets of that firm, and dealt with altogether as their own property. The appellant had no interest in them at all from the time they were taken by Turner, Sr., except to get from him their fair value.

There was no election here, as indicated by the Court below. The appellant simply insisted that the values put on the goods were too low. There was no contention that the goods did not belong to Turner, Sr., after he had taken them over, but he was asked merely to pay the *fair value* for them.

We submit that Auditor's Account D should be ratified, as it is based upon the average cost of these goods to the manufacturer, after a comparison of several years of business. The conclusions reached as to values in Auditor's Account D are strikingly corroborated in the evidence furnished by the appellees themselves. When they sent this cargo to New Orleans, it was supposed to contain 620 1-12 tons of Am. Phosphate, and 7,444 empty bags. In marine insurance the invoice cost of the goods is usually increased 10 per cent. for manufacturer's profit.

The insurance on this cargo was.....	\$24,000 00
7,444 bags cost	\$766 20
10 per cent....	76 62

	842 82

Insured value of 620 1-12 tons.....\$23,157 28

But, as this amount included 10 per cent. added to the invoice cost, the real cost of the 620 1-12 tons, as estimated by the appellees themselves, is \$21,051.99, or about the value which we reach by an entirely different method of calculation.

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William A. Fisher and John Prentiss Poe, Attorney-General, for the appellees.

As to the New Orleans shipment. Mr. Turner having taken these goods over at what he honestly believed was their fair value, and having, as the result showed, lost heavily by thus taking them over, stood to what he had done, and made no attempt to ask from Mr. Keiley a reimbursement to him of his one-third of such losses, but was content to bear them alone. When, however, his right thus to deal with this merchandise is successfully challenged by Mr. Keiley, the natural and obvious equity of the case would seem to require that he should bear his fair share of the losses actually sustained by the liquidating partner, and in the absence of any allegation and proof of careless, improvident or fraudulent conduct of the liquidating partner in making disposition of the merchandise belonging to the firm, either in the shipment to New Orleans or in the sales here, the appellant seeking equity should do equity.

He claims that he is entitled to the market value of the manufactured goods taken over and disposed of by the liquidating partner. Grant it. How is this market value to be ascertained? By the known results of the actual sales of every pound of the goods, as we contend, or by an average estimate of what similar goods during an average of former years had produced, as he contends? By an allowance, also, of the several items of cost, viz.: storage, clerk hire, commissions, bad debts, &c., or by a rejection of these manifestly fair items? Obviously the former of these two modes has the merit, not a small one in a case of this description, of absolute exactness, while the latter necessarily involves uncertainty and conjecture.

The one insisted on by us is the exact result which would have been reached if the partners had jointly made the sales after the dissolution, received every dollar of the gross proceeds of the sales, paid out of such proceeds all the cost of selling them, including storage, clerk hire, commissions and the like, and borne equally amongst themselves the losses

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occasioned by bad debts—that is, the failure of some of the parties purchasing some of the goods to pay for them. The other mode, that urged by the appellant, is not only an estimate merely of the market prices that the goods might have been sold for, but it puts upon the liquidating partner all the burden, liability and responsibility of finding a sale for the goods, as well as the cost and expenses of keeping the goods until sold, and the failure to collect from the purchasers the prices agreed to be paid.

As to salaries. From the statement in plaintiff's bill, it seems clear that the articles of co-partnership were executed in blank, and he alleges that three copies were executed—the copy which he retained having inserted in it, *after execution*, and without the knowledge or consent of J. J. Turner, Jr., the provision in his, Keiley's favor of \$450 a month. It is not often, we hope, that a litigant comes into Court founding his claims upon a secret addition to a written instrument, not only not known to, but carefully concealed from a party who is sought to be bound by it; and it is not surprising that the Court below did not adopt this somewhat extraordinary contention of Mr. Keiley.

The alleged original secret agreement is not proved. Mr. Keiley's averment in his bill, can not be accepted as proof. His allegation is denied distinctly by J. J. Turner, Jr., and is not admitted in the answer of J. J. Turner, Sr. But even if the answer of the latter can be treated as an admission of the alleged agreement, such admission is not evidence against J. J. Turner, Jr. But if we assume for the sake of the argument, that the precise details of this alleged private agreement are proved, we further maintain, that it can not be considered in this case. The stipulation was confessedly a private understanding between Mr. Keiley and J. J. Turner, Sr., and hence is properly enforceable only in a proceeding between the *two* parties to it. Surely it has no fair place in a joint accounting between the *three* partners.

For similar reasons, the discontinuance in August, 1881, of all the salaries to all the partners is binding upon all in this joint accounting of the affairs of the partnership.

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It was competent for the partners, by common consent, to modify any of the terms of their co-partnership understanding ; and accordingly, when the three partners determined that from and after August 1, 1881, no salaries should be paid to any of the partners, this constituted from that time out a new contract, binding upon, and enforceable against, all *three* ; and no Court of Equity, we submit, can be expected, in the face of an admitted agreement between *three* partners, to give effect, as against one of the three, in a joint accounting of the affairs of the whole firm, to a *secret* agreement between *two*. The carrying into effect of such a private agreement would operate practically as a fraud upon the third partner, from whom the existence of such a secret stipulation between the two was carefully withheld.

BRYAN, J., delivered the opinion of the Court.

This suit was instituted by the appellant for the purpose of obtaining a settlement of the partnership business of J. J. Turner & Co. The firm was composed of Joshua J. Turner, his son-in-law John D. Keiley Junior and his son Joseph J. Turner. The record is a very large one, and is filled with elaborate examinations and cross-examinations of witnesses, and with long and minute statements relating to the matters in controversy, made up from the books and papers of the partnership and from other sources. We were informed at the argument by the counsel on both sides that the subjects of dispute were few in number. But to make a just and intelligent disposition of these questions required a careful and attentive examination of the whole record, so as to understand the respective rights and duties of the partners, and the nature, extent and character of their dealings with each other.

We will state so much of the proceedings in the cause as may be necessary to explain the grounds of the opinion which we have formed in regard to this controversy. The bill of complaint alleges that on the nineteenth day of March eighteen hundred and seventy-eight, a co-partnership was formed between the complainant John D. Keiley

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and Joshua J. Turner and Joseph J. Turner Junior, under the name and style of J. J. Turner & Co., and that the business of the co-partnership was to deal in fertilizers and agricultural goods of every description. A paper called a *copy* of the articles of co-partnership was filed with the bill, marked "Complainant's Exhibit No. 1," and it was alleged that three copies of the articles of agreement were executed and signed by all the partners, which were identical in every respect, except in the provisions relating to the salaries of the partners. These provisions will be noticed hereafter. The paper filed with the bill states that during the continuance of the partnership Keiley's salary should be four hundred and fifty dollars a month, and that the salary of Turner Junior, should be three hundred dollars a month during the same period; no salary was allotted to Turner, Senior. In his answer Turner Junior says: "That whilst there were three copies of said articles, as stated in said bill, prepared, yet, as he remembers, only one of them was signed by the parties, of which complainant possessed himself, and is the Exhibit No. 1, so filed with said bill." And Turner, Senior, says in his answer: "That the partnership stated in said bill was entered into, and that the articles filed as Exhibit No. 1 constitute the agreement therefor then made, and that, although three copies thereof may have been written, yet, as he remembers, only one of them was signed, and that is the one filed with said bill." We think it very evident that the draughtsman of the bill inadvertently designated his exhibit as a *copy* when he intended to charge that it was an *original* paper, as it really is. The provisions relating to the salaries above mentioned as being different in the different copies of the articles of partnership are thus alleged in the bill of complaint. After stating that the matter was discussed in the Turner family, it is said: "It was suggested that the difference between the sum to be allowed said Joseph J. Turner Jr., as above proposed, would cause jealousy and ill-feeling on the part of the latter, and it was urged that the matter should be so

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arranged that the difference should not be known to said Joseph J. Turner Jr., and accordingly it was arranged that Mr. Joshua J. Turner should be allowed \$150.00 per month on the books, and your orator and Joseph J. Turner Jr., \$300.00 each per month ; the allowance to said Joshua J. Turner, however, to be for the use and benefit of your orator. In the preparation of the articles, which were signed after the partnership had begun, the amounts to be paid as salary to each partner were left blank on the three drafts, but at the time the articles were read and approved and executed, the amounts to be allowed to each partner were stated as being \$300.00 each per month to your orator and Joseph J. Turner, Jr., and \$150.00 to said Joshua J. Turner, as above agreed upon, but the two drafts of said agreement, that were retained by your orator and said Joshua J. Turner, had inserted in them the amount of \$450.00 per month to your orator, and \$300.00 to Joseph J. Turner, Jr., the actual amounts to be paid under the agreement aforesaid, between your orator and said Joshua J. Turner. Thus it came about that said Joshua J. Turner was credited on the books of the firm with \$150.00 per month, which he was to pay to your orator as part of his salary. And settlements were had between him and said Joshua J. Turner on the basis of said agreement, your orator having received some payments on account of said allowance of \$150.00 per month, from said Joshua J. Turner in other ways, and some in money drawn from the firm and charged to said Joshua J. Turner, as agreed, but a large sum yet remaining due him on this account. Your orator does not claim that in stating the partnership account prayed for, salaries shall be allowed on any other or different basis than the agreement among the members of the firm, that is to say, \$300.00 each per month to him and said Joseph J. Turner, Jr., and \$150.00 per month to said Joshua J. Turner, but he claims that as between himself and said Joshua J. Turner, the amount credited to the latter for salary shall be treated as credited to and due to your orator under the agreement

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aforesaid." Responding to this statement, Turner Junior, in his answer says, that all previous negotiations in regard to salaries were merged in the articles of co-partnership, and that "as to the arrangement therein provided as to the payment of salaries, his only knowledge is as therein contained, and he is prepared to abide thereby; but as to any sub-arrangements between said Keiley and his father as to any division of his salary he knows nothing, is not a party thereto, nor in any manner connected therewith." And Turner, Senior, in his answer says: "That, however, the matter of salary was arranged at the time, and this defendant, in his then state of health, not attaching any great importance thereto, by reason of the relationship of the parties, he did agree to the alterations of the articles as stated, and entries were made for the purpose of family peace, as stated." The articles provided that the partnership should continue for three years; it is alleged, however, in the bill, that it was continued until the thirty-first of December, eighteen hundred and eighty-two, when it was finally dissolved. The complainant alleges that upon a settlement of the partnership affairs it will be found that a large sum of money is due to him. The prayer of the bill is for an account and for the payment of the balance due. After answers by the Turners, and the taking of testimony, an account was decreed and several different accounts were stated by the Auditor. In the meantime Joshua J. Turner had died, and the Safe Deposit and Trust Company had been appointed his executor. After hearing, the Court below ratified statement No. 2 of Account E, which showed a balance due by Keiley, and it decreed the payment of this balance to the executor of Joshua J. Turner. Keiley has appealed to this Court.

The amount of salary due to Keiley gives rise to one of the principal questions in the case. It will be observed that Complainant's Exhibit No. 1 fixes his salary at four hundred and fifty dollars a month. Both of the answers admit that this agreement was signed by all the partners, and they

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do not admit or allege that any other one was signed, and there is no evidence that any other was signed. This agreement, therefore, according to the ordinary course of practice, is established as the contract between the parties. The answer of Turner Junior states that his only knowledge on the subject of salaries is what is contained in this exhibit, and that he is prepared to abide by it, and he disclaims any knowledge of what is styled sub-arrangements between Keiley and Turner, Senior, as to any division of his salary. The answer of Turner, Senior, distinctly states that "he did agree to the alterations of the articles as stated, and entries were made for the purpose of family peace as stated." We see, therefore, that there is a perfect agreement as to Keiley's salary at four hundred and fifty dollars a month; and as to the very peculiar method of stating a portion of it on the books to the credit of the elder Turner for Keiley's benefit, all knowledge of an agreement to that effect is denied by the younger Turner, while it is admitted by the elder. A majority of the Court are of opinion that Keiley is entitled only to a salary of three hundred dollars a month as against the assets of the firm, and that if he is entitled to the additional amount, \$150.00, his recourse is entirely against the estate of Turner, Sr. After the first day of August, 1881, there were no entries of salaries on the books of the firm. This omission was with the knowledge and consent of all the parties. There was evidence which the appellant's counsel argued sufficiently and satisfactorily explained this omission. But the majority of the Court think otherwise, and hold that Keiley is not entitled to any salary after this date. The writer of this opinion is constrained to hold a different view on both of these questions, but as the Court's judgment has been pronounced, any discussion of them would tend to no result and would be superfluous.

By the articles of partnership it appears that the elder Turner contributed all of its capital, and that it consisted of stock in trade, merchandise, land and buildings suitable for carrying on the business. This capital was valued at one

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hundred and twelve thousand, two hundred and forty-nine dollars and seventy-eight cents, and it was agreed that he should be paid interest on this sum half yearly at the rate of six per cent. per annum, and that this payment of interest should be considered an expense of the business, and so charged on the books. There seems to be no dispute about the amount due him except in one particular. In the settlement of the accounts he took into his possession the stock and merchandise of the firm which remained on hand, and he charged himself with it at a valuation fixed by himself and the younger Turner. Keiley knew that he had taken possession of this merchandise and did not object to it. But the question is about the value of it. As Keiley assented to the appropriation of it, he is entitled to its value at the time; he would not be entitled to any increase in value; neither is he to lose by any depreciation. We see nothing in the record which can justly give any ground for a question of fraud in the transaction. It is simply a question of amounts and value. The parties differ very materially on these questions, but this is a very usual occurrence in lawsuits. The principal item is a quantity of ammoniated phosphate. Turner, Senior, is charged with five hundred and ten tons as belonging to the firm, while Keiley contends that he ought to be charged with six hundred and twenty-six and a fraction. The question is not entirely clear upon the evidence, but, after a careful consideration of it, our best judgment is that the firm owned five hundred and ten tons, and that the remainder of the ammoniated phosphate which Turner had in his possession was his individual property. The valuation presents a question of considerable difficulty. A good deal of testimony was taken on the subject, and calculations were made by the plaintiff's counsel to show the average value of the phosphate during the preceding year. This would give an approximation more or less accurate. We have, however, an estimate of more satisfactory. It is a valuation made by Turner himself. He shipped all of this merchandise to New Orleans in

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his own name and insured it in his own name. The amount of phosphate was estimated at six hundred and twenty and a-half tons, and it was insured for twenty-four thousand dollars. It is shown by the testimony of Willson, the marine insurance agent who effected the insurance, that it is usual to add ten per cent. to the invoice cost in insuring cargoes. So that we may assume that the amount insured was the value of the phosphate with ten per cent. added. A very simple calculation will show the value to be placed on the whole mass of six hundred and twenty and a-half tons ; and the proportion of value to be assigned to five hundred and ten tons is equally easy of ascertainment. This amount will be charged to Turner as the fair price of the phosphate at the time he took it into his possession as his individual property. A loss was sustained on the shipment to New Orleans, which was caused in great measure by the failure of the purchasers of the phosphate to pay for it. With this loss Keiley has no concern.

The interest on Turner's capital was credited to him down to December thirtieth eighteen hundred and eighty-two. It appears that he did not draw his interest semi-annually as it accrued, but let it remain as part of the capital of the firm ; and that he was allowed interest on these successive contributions of capital, which was computed from the several times at which the interest became due. It was stipulated in the articles of partnership that the salaries and the interest on Turner's capital should be paid out of the funds of the partnership. It was further stipulated that the profits should be equally divided between the partners, and that the losses should be borne in the same proportion ; and that the salaries should not be considered as losses sustained by the business. The meaning of this latter provision is very evident. The salaries were to be paid at all events, and were not to be diminished on account of any losses which might occur. It was urged by the appellant's counsel at the argument that this rule was violated in the preparation of the balance sheet filed and marked "Defendant's

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Exhibit Examiner F. A. L. No. 2." As the books from which this balance sheet was made up have not been shown to us, we have not the means of deciding on the merits of this suggestion. The record shows us that Keiley allowed large portions of his salary to remain in the hands of the firm. These sums were used for its benefit, and were contributions on his part to its capital. He ought to be paid interest on these amounts, not on the ground that payment was withheld by the firm, but for the reason that he furnished money which was used in the transaction of its business. Payments of salary were due monthly, and from the time they became due interest is properly chargeable for his benefit; that is to say, each month's salary is to bear interest severally as it became due, in the same manner as interest was allowed to Turner on the half-yearly instalments which were payable to him.

We have stated our views on the questions which the counsel informed us at the argument were the matters of difference between them. The result is that Statement No. 2 of Auditor's Account E is rejected and set aside, and the decree of the Court below is reversed and the cause remanded, to the end that an account may be stated in accordance with this opinion, and a decree passed for the payment of the sum thus ascertained to be due.

*Decree affirmed in part and reversed
in part; the costs in this Court to
be equally divided, and the costs
below to be paid by the appellees.*

(Decided March 27th, 1895.)

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Syllabus.

FRANCIS M. COX *vs.* ALEX. M. BRYAN, OFFICER
OF REGISTRATION, ETC., ET AL.

Appeal from Officer of Registration—Agreement of Counsel as to Time of Taking Appeal.

The jurisdiction of a Court to entertain appeals from the action of officers of registration of voters is special and limited and distinct from its general authority; and when a statute prescribes the time within which an appeal may be taken from the action of such an officer, neither an agreement of counsel nor an order of Court can confer jurisdiction to entertain an appeal taken after the time fixed by statute.

The Act of 1892, ch. 573, provides that a party aggrieved by the action of an officer of registration shall have the right to appeal forthwith from such action to the Circuit Court within one week after the final day of the October sitting of the registration officers. The appellant's name was struck from the list of voters in a certain precinct in the year 1894, when the day of such final sitting was October 15. On October 26, the State's Attorney agreed that no advantage should be taken of the fact that the petition or appeal was not filed within one week from the last day of the sitting. On October 27, the Court below ordered that the petition be filed as of October 22, and it was actually filed October 30. *Held*, that the Court had no jurisdiction to entertain the appeal, and that the same should be dismissed.

Appeal from an order of the Circuit Court for Charles County (CRANE, J.), dismissing the petition of the appellant, asking the Court to order his name to be reinstated as a qualified voter upon the registries of voters of Charles County. The case is stated in the opinion of the Court.

The cause was submitted to the Court upon briefs by *F. M. Cox*, for the appellant, and *J. F. Matthews, State's Attorney for Charles County*, for the appellees.

PAGE, J., delivered the opinion of the Court.

The appeal to the Court below was not filed within one week from the last day of the sitting of the registration

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officer. His last sitting in 1894, was on the 15th day of October, and the petition was not filed until the 26th of October. By section 21 of the Act of 1890, chap. 573, it is provided that the person aggrieved "shall have the right to appeal forthwith from such decision or action to the Judges or Judge of the Circuit Court * * by petition verified by his oath or affirmation within one week after the final day of the October sitting for revision."

It appears that the State's Attorney agreed that no advantage should be taken of the delay, and the petition might be filed *nunc pro tunc*, and that thereupon the Judge, on the 27th of October, ordered that the petition be filed as of the 22nd of October, 1894, in accordance with the agreement. But neither the agreement of counsel nor the order of Court can confer jurisdiction in a case where the law does not authorize the Court to take cognizance of the matter. This is a proceeding under a statute, and to give the Court jurisdiction, the requirements of the Act must be strictly complied with. *Shelby v. Bacon*, 10 Howard (U. S.) 56; *Ticer v. Thomas*, 74 Md. 345.

The case was therefore not properly before the Circuit Court, and its rulings consequently cannot be reviewed by this Court. The appeal will therefore be dismissed.

Appeal dismissed.

(Decided February 28th, 1895.).

A motion for a re-argument was subsequently made, and in disposing of this motion,

PAGE, J., delivered the opinion of the Court.

The appellant, in support of his motion for a re-argument, assigns as his first reason, that the judgment of this Court was based "upon a point not raised in the pleadings below, the exceptions taken, or the briefs of argument submitted by either of the parties to the cause, but solely by an inspection by the Court of certain endorsements upon the petition set forth in the record; whereas, by an inspec-

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tion of the docket entries in the case, it appears that *one petition* and affidavit was filed in the Court below on the 20th day of October, 1894, which was within one week after the 15th day of October, 1894, the final day of the October sitting of the officer of registration." It is true, the words, "Filed Oct. 20th, 1894," do appear among the docket entries, but they cannot be held to designate the time of the filing of the petition, which forms the basis of the appellant's complaint. The record clearly shows, that on the 26th October, 1894, the State's Attorney agreed that no advantage should be taken "of the *fact*, that the foregoing petition" (that is the appellant's), "was not filed within one week from the last day of the sitting of the registration officer." On the 27th October the Judge ordered that the petition be filed as of the 22nd October, and on the 30th October it was actually filed. If "one petition" was actually filed on the 20th October, as the appellant seems to desire us to determine, it is not in the record, forms no part of this proceeding, and this Court can take no notice of it whatever. We are unable to determine upon what ground the action of the learned Judge below was based. The record only discloses the fact that the petition was "dismissed;" whether because the appeal was not in time, or for other reasons, it does not appear. Certain it is, that one B. F. Dement, who appears to have been summoned, moved to dismiss because the appeal was not taken in time. The State's Attorney and the petitioner entered objection to the leave granted by the Court to Dement, to file this motion, but this was overruled; and thereupon the petition was dismissed. So that, whether the Court committed an error in permitting Dement to file his motion or not, it appears the point was raised below, and for all that the record shows might have formed the sole reason which induced the learned Judge to dismiss the petition. However this may be, we do not think it was necessary in order to maintain the judgment in this Court, to determine whether the point was raised below or by

counsel in argument here. The jurisdiction of the Judge to entertain appeals from the officer of registration, is special and limited, and distinct from and not embraced by his general authority ; and where such jurisdiction is conferred by Act of Assembly on any tribunal, its power to act, as it has done, must appear upon the face of the proceedings. If these proceedings are brought to this Court for review, it must appear that everything has been done, "which the law required as the basis of the authority that has been exercised ;" and to such an inquiry the ninth section of Article 15 of the Code has no application. *Boarman v. Patterson*, 1 Gill, 381 ; *Coward, Garn. v. Dillinger & Stevenson*, 56 Md. 61.

2. The appellant, in his motion, strenuously insists that the time prescribed in the Act of 1890 for appealing from the register is directory and not mandatory, and not being jurisdictional can be waived. We have examined all the authorities to which we have been referred. They announce a principle often maintained by this Court, and one which we do not in this case in any wise mean to impugn. It was clearly stated in the case of the *State, &c., v. The Co. Coms. of Balto. County*, 29 Md. 522, in these words, that "where the duty prescribed is of a public nature, and intended for the public benefit, and is directed to be performed within a specified time, Courts have adopted as a general rule of construction of statutes that they are in respect to time, to be regarded as directory merely, unless from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power." Now we are of the opinion that both from the nature of the Act to be performed, and from the language of the 21st section of ch. 573 of the Acts of 1890, the time prescribed within which appeals from the register must be taken, is a limitation upon the right of the party appealing, and upon the Judge to whom the appeal is taken. The registration laws passed in pursuance of the fifth section of Article 1 of the Constitu-

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tion of the State, have a far wider scope than simply to conserve private rights. They are of the "utmost importance to all the citizens of the State. One of the great objects sought to be attained, as well by the framers of the Constitution as by the Legislature, manifestly was the securing of fair and honest elections by means of a system of registration of voters." This statute must "then be construed by the Courts in the light of this manifest legislative intention, and all its directions to, and requirements of, the officers who are to execute it must be regarded as important, and as having this object in view." *Mincher v. State*, 66 Md. 227. In order to secure this object, the Legislature, by this twenty first section, has thrown wide open the right to appeal from the action of the register. Not only is it given to the person applying for registration, but to "any person who thinks himself aggrieved; " that is, to any person who thinks the register has acted improperly, and the applicant himself need not be made a party. But while by the terms of the Act, the right of appeal is thus made so extended, and in consequence likely to become a means of oppression and wrong in the hands of designing persons, whereby citizens could be deprived at particular elections of their right of franchise, the Legislature has carefully and wisely expressed the terms upon which the appeal may be taken. It must be, after the final day of the October sitting, *Ticer v. Thomas*, 74 Md. 345, and within one week thereafter. The clause is not thrown in "parenthetically," but is in the very paragraph and sentence by which the right is conferred, and forms one of the terms upon which it may be exercised. It is not a modal regulation, as was the case in *Ayres v. Watson*, 113 U. S. 594, but is so interwoven with the authority granted, as to form in itself a part of it. It was intended for the protection of the public, as well as of the rights of the individual citizen, and such requisitions are always construed to be mandatory. *French v. Edwards*, 13 Wall, 511; *Lyon v. Alley*, 130 U. S. 177-185. In *Plummer v. Wilson*, 73 Md. 474, it was held that "an

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exception prepared and signed, with appeal taken long after the expiration of the five days, gives this Court no jurisdiction to hear and decide the case." There the words of the statute are, "all such appeals shall be taken within five days;" in this case the words are, "he shall have the right to appeal forthwith, &c., by petition, &c., within one week after the final day of the October sitting for revision." In *Sutherland case*, 74 Md. 326, no question as to time within which the appeal should be taken was raised in or considered by this Court. In *Ticer v. Thomas*, 74 Md. 345, it was held that an appeal taken prior to the final day for revision was premature, and the Circuit Court was without jurisdiction to hear it. In the opinion filed in that case are these words: "Now, whilst the clause providing for an appeal authorizes the appeal to be taken forthwith, it must in ordinary fairness to the officer of registration, have meant forthwith upon a final decision or action, and within one week after the last sitting in October."

There is no error in the form of the judgment of this Court. The Judge below dismissed the petition, and being of opinion he was correct in so doing, we affirm his judgment.

Motion for rehearing overruled.

(Decided April 25th, 1895.)

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Syllabus.

**THE STATE OF MARYLAND *vs.* CHARLES G.
APPLEGARTH ET AL.**

*License Taxes—Constitutional Law—License Tax Imposed on Oyster
Packers—Title of Statute.*

The Legislature has the constitutional right to require the payment of a license fee for the privilege of carrying on a particular kind of business; and the question as to what occupations shall be licensed and what rates shall be charged, must generally be left to the discretion of the Legislature.

The oyster beds of the Chesapeake Bay are the property of the State, and the Legislature has the power to pass laws determining when oysters can be taken, and to make all reasonable regulations concerning the same.

Code, Art. 72, as amended by the Act of 1894, ch. 380, requires every person engaged in the business of packing or canning oysters for sale or transportation to take out a license, paying therefor a sum graduated according to the quantity of oysters packed by the applicant; the money so obtained to be placed to the credit of the Oyster Fund and used in maintaining a police force for the protection of oysters, etc. *Held,*

- 1st. That the license fee so required is not a tax on property, but a license tax on business or occupation.
- 2nd. That the provision requiring such license fees to be paid into the Oyster Fund is not open to objection, since, if the Legislature has the right to impose the tax, it can determine what shall be done with the money arising from it.
- 3rd. That such tax is not a regulation of inter-state commerce within the Constitution of the United States, since no exemption can be claimed from a general tax on business, upon the ground that the products thereof may be used in commerce.

The above mentioned Act of 1894, was entitled, An Act to repeal Art. 72 of the Code, title "Oysters," and to re-enact the same with amendments; and it provided that persons engaged in the business of packing oysters should pay a license tax. *Held,* that the Act was not in violation of Constitution, Art. 3, sec. 29, as embracing a subject distinct from the title.

Appeal and writ of error from the Criminal Court of Baltimore City. The case is stated in the opinion of the Court.

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The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE and BOYD, JJ.

John Prentiss Poe, Attorney-General, for the appellant.

Edgar H. Gans, for the appellees.

There is a great difference between a license required for purposes of *regulation* and a license which is used for the purpose of raising *revenue*. The first is imposed under the police power; the second under the taxing power; with the first, fees may be charged to defray the cost of the regulation; the second may be accompanied by a revenue exaction which bears no proportion to the costs of regulation. This distinction is of prime importance in this case. "When the grant is not made for revenue, but for regulation, a fee for the license may be exacted, but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and of *inspecting and regulating the business which it covers.*" *Cooley on Taxation*, 598. If under the guise of licensing a municipal corporation should attempt to raise revenue, its ordinances would be void. *Vansant v. Harlem Stage Co.*, 59 Md. 335; *Steele v. Rowe*, 72 Md. 533; *Turner v. Maryland*, 107 U. S. 38.

Now, the business of packing and canning oysters for sale or transportation is not *regulated* by any part of the oyster law; the fees, so called, imposed by section 66, are not a part of any bill of costs for regulating *this business*; on the contrary, they go into the "Oyster Fund;" and this fund is expressly to be used to protect fish and oysters in Maryland waters by regulating the business of catching and taking oysters. To require A to take out a license to provide funds for regulating the business of B is a *tax* as to A. To impose a license fee on the oyster packer to provide money for regulating the business of the oyster dredger and tonger is a *tax* as to the oyster packer, but would not be a *tax* at all if imposed on the dredger and tonger, whose busi-

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ness is being regulated. We are not contending that the oyster packer cannot be taxed by requiring license fees for the prosecution of his business, as the Attorney-General seems to think. We admit that his business or his property may be taxed just as any other business or property. But we do say he can't be singled out and be exclusively taxed for the maintenance of a general public burden when everybody else is not taxed to support such burden. With the exception of a small license tax of \$25 imposed on commission men selling oysters, the packers and canners of oysters for sale or for transportation are the only persons in the State taxed for the general public burden. The oyster fund is made up of moneys received from dredging and tonging licenses—which we have seen are not taxes at all—from fines, penalties and forfeitures, incurred in the enforcement of the oyster laws, from a regulation fee imposed in the culling of oysters.

The question involved in this appeal is this: Can one class of men be taxed in their property or occupation, exclusively, by a method different from that used as to every other tax, to support a general public burden? We answer, no, for the following reasons: (1.) The tax is really on the property and not on the occupation. *State v. C. & P. R. R. Co.*, 40 Md. 22; *Welton v. State*, 91 U. S. 278; *Brown v. Maryland*, 12 Wheaton, 444. (2.) The nature of the taxing power requires uniformity. *Cooley, Taxation*, 141, 201, 244; *Desty on Taxation*, 29; *Wells v. Hyattsville*, 77 Md. 138; *Talbot Co. v. Queen Anne's Co.*, 50 Md. 245; *Dorgan v. Boston*, 12 Allen, 237; *Hammett v. Phila.*, 65 Pa. St. 151. From these authorities it appears that the citizen is guaranteed against arbitrary and irresponsible discrimination by the fundamental rules of taxation, which apply to all kinds of subjects. Can you tax only the traders of Baltimore City to build a bridge in Kent Co.? Evidently not, and yet the tax is on occupations and business. Nor could you tax the lawyers of Baltimore City, exclusively, to pay the salaries of the Judges of the Court of Appeals,

nor could you by a license tax on the occupation of the lawyers of Baltimore City alone, attempt to raise a revenue to pay for the Court House of said city. It is of the essence of taxation that there should be some system of apportionment. To select one single class in the community and tax it for a general public burden, is no more legitimate than to select one individual of that class for that purpose. It is not taxation, it is more like eminent domain, without the *compensation*. Why should oyster packers pay for the oyster navy, any more than criminal lawyers pay for the police force?

(3.) But if the license be regarded simply as a tax upon the business or occupation of the packer and canner, it would still be obnoxious to the constitutional rule. All other license taxes which are really *taxes* on occupations, such as traders, have a definite rule of apportionment. The license is regulated by the amount of the stock on hand, calculated by its value. In this case there is no calculation as to value. The tax is ten cents per hundred bushels, no matter whether oysters are high or low, and might just as validly be fifty cents per hundred bushels, or any other arbitrary sum. The rule of apportionment when once fixed must be uniformly applied in the same taxing district.
Tiedeman, Police Powers, 477-8; Cooley, Const. Lim., 619; Knowlton v. Supervisors of Rock Co., 9 Wis.

(4.) If this license fee is to be regarded as a mere tax on the business of the packer, then this law embraces a subject distinct from its title, and distinct from the body of the Act. Traders' licenses are regulated by Code, Art. 56, sec. 35. Under that section packers have been exempt as manufacturers. If the object is to repeal this exemption, that object cannot be accomplished in a general oyster law.

BOYD, J., delivered the opinion of the Court.

The appellees were indicted for engaging in the business of packing and canning, for sale and transportation, oysters taken in the waters of this State, without obtaining from the State a license therefor. A demurrer to the indictment

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was interposed, which was sustained, *pro forma*, by the Court below. The prosecution is based on sections 66 and 67, Article 72 of the Code of Public General Laws, as amended by chapter 380 of the laws of 1894. It is contended on behalf of the appellees that these sections are: (1), in conflict with the Constitution of this State, because the license provided for is an arbitrary and unequal tax, contrary to the 15th Article of the Bill of Rights, and not a lawful exercise of the police power of the State; and (2), that they are a regulation of inter-state commerce in violation of the Constitution of the United States. We will consider the case in that order.

There has been on our statute books for many years legislation having in view the protection and preservation of the oysters of this State. Since 1860 a separate Article has been devoted to this subject in the several Codes of Public General Laws of Maryland. For some years past the Legislatures have generally been called upon to devote more or less time to this important subject, and at the session of 1894, Article seventy-two, title, "Oysters," of the Code, was repealed and re-enacted with amendments. Section 66 of that Article, as thus amended, requires every person, firm or corporation engaged in the business of packing and canning oysters for sale or transportation, to take out, on or before the first day of September in each year, a license to engage in such business by application to the Clerk of the Circuit Court of the county in which the place of business of such applicant is situated, or to the Clerk of the Court of Common Pleas, if in Baltimore City. The applicant is required to state the number of bushels of oysters which he proposes to pack during the succeeding eight months, and to pay at the time of issuing the license the sum of twenty-five dollars for such license, and in addition thereto, the sum of one dollar per thousand for every thousand bushels over ten thousand so estimated in his application, as the total number to be packed during the season. He is also required to make a return under oath

within thirty days after the 25th day of April in each year (that being the end of the season in which oysters can be caught), to the clerk from whom he obtained the license, of the number of bushels packed or canned by him during the season, and to pay the clerk the further license money of one dollar per thousand for each thousand bushels packed or canned by him over and above the estimate in his application. This report must be forwarded to the Comptroller of the State, who is authorized to return any overpayment in case he is satisfied that the total number of bushels packed by said person was less than the number stated in his application. This section further provides, that all moneys thus received from said licenses shall be paid over and accounted for by the clerks to the Comptroller, to be placed by him to the credit of the Oyster Fund, as provided by section 29 of said Article. The latter section provides for the payment of moneys received from dredging licenses and other sources therein named into the treasury, to be "placed to the credit of a fund, which shall be called 'The Oyster Fund,' and the same shall be kept separate and distinct from other funds in the treasury, and shall only be drawn upon for the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters, and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force." Section 67 fixes penalties for the violation of section 66, and authorizes any person to pay the sum of \$300 *per annum* for a license, without being required to report the number of bushels handled by him or otherwise disclose the operation of his business.

The above are the material parts of the sections of this law directly involved in this case. An examination of the other provisions of this Article will show that the Legislature has required those engaged in catching and taking oysters for sale out of the waters of Maryland with rakes, tongs, scoops, dredges and other instruments, to take out

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licenses, and also those engaged in selling oysters on commission. It will also be seen that great care has been taken to require persons connected with the oyster business to deal fairly with the State, and large outlays of money are provided for, to be paid out of the Oyster Fund, for the purpose of regulating, preserving and protecting this important and valuable industry of our State.

In considering this question, it is well to bear in mind that the oyster beds are the property of the State (*McCready v. Virginia*, 94 U. S. 391; *Bradshaw v. Lankford*, 73 Md. 431), and that the Legislature, representing the sovereign power of the State, can pass laws determining how oysters can be taken, can prohibit them from being taken at all, or make such other reasonable regulations concerning them as it may deem best and proper for the interests of the State at large. If the restrictions imposed upon those engaged in the business of taking oysters be withdrawn, the oyster beds might be destroyed or at least seriously injured. It has therefore been deemed proper by the Legislature to provide a "State Fishery Force" at large expense, to enforce the laws passed for their preservation and protection. If the income from licenses granted under laws existing prior to 1894 proved insufficient to meet the demands on the State, the Legislature had the undoubted right to provide for the deficiency, provided, of course, it kept within constitutional bounds. If there be a class of persons engaged in business in this State who are largely dependent upon the oysters in the waters of this State for the conduct of their business, but who had heretofore not been required to have and pay for licenses for the privilege of engaging in such occupation, we can see no just or equitable ground to restrain the Legislature from requiring them to do so, unless prohibited by the organic law of this State or of the United States. Such legislation on this particular subject might well be justified on the ground that the State, as owner of the oysters, is entitled to a reasonable and fair compensation for them, and it may not be deemed just or wise to impose

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all the burden on those who oftentimes undergo great hardship and suffering in catching them; and, therefore, those engaged in packing and canning them are called upon to contribute their share of the compensation. If the State is not to profit by sales of its property, it should at least be protected from any loss in caring for it, and all those engaged in the oyster business might justly be required to contribute their proportion of the cost and expense of preserving them.

When we remember that oysters in the waters of the State belong to it, and see from an examination of the Article of the Code in which the sections now before us are embraced, the great expense incurred by the State in fostering and encouraging this industry and preserving the oysters, and that all the revenue derived from the licenses objected to in this case are required to be placed in the separate fund applicable to those purposes, we might perhaps content ourselves by declaring this law to be valid on the ground that these license fees are imposed for the regulation of the oyster business, with which oyster packers are connected. But we are now dealing with a statute passed by the Legislature for the benefit of the State, and we are not called upon to draw nice distinctions between the power to license for regulation and the power to license with a view to revenue, as is sometimes required in construing charters of municipal corporations, for the purpose of determining whether or not such corporation had the power to exact certain license fees. The cases of *Vansant v. Harlem Stage Co.*, 59 Md. 335, and *State v. Rowe*, 72 Md. 553, cited by the appellees are of the latter kind.

The privilege of carrying on the business of packing and canning oysters is made, by this law, to depend upon the taking out of a license, and we do not think the provisions of the State Constitution looking to equality and uniformity in taxation are thereby violated. It is said in *Tiedeman's Limitations of Police Power*, 282, that "the most common objection raised to the enforcement of a license tax is that

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it offends the constitutional provision, which requires uniformity of taxation, since the determination of the sum that shall be required of each trade or occupation must necessarily, in some degree, be arbitrary, and the amount demanded more or less irregular. But the Courts have generally held that the constitutional requirement as to uniformity of taxation had no reference to taxation of occupation." The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this State, and the license fees required to be paid have been fixed, in the discretion of the Legislature, according to circumstances and the character of the business. Take for example the licenses to brokers. Exchange and insurance brokers are each required to pay one hundred dollars *per annum*; stock and merchandise brokers, seventy-five dollars; real estate and bill brokers, fifty dollars *per annum*. Those engaged in the sale of ordinary goods, chattels, wares or merchandise are required to pay, according to the amount of stock, at the principal season of sale, thus varying from twelve to one hundred and fifty dollars *per annum*. Those selling spirituous or fermented liquors in quantities not less than a pint are required to pay from eighteen to one hundred and fifty dollars *per annum*, while ordinary keepers pay from twenty-five to four hundred and fifty-dollars, according to the rental or annual value of the premises. Other instances might be cited, but these serve to illustrate what has been the practice in this State, and it would scarcely be contended that licenses cannot be required of persons engaging in such occupations as those above mentioned. Upon what principle then is the license fee required of oyster packers illegal? It is argued that the method adopted is novel. If that be admitted, it does not invalidate the law, but it does not materially differ from the traders' licenses so far as the method of fixing the rate is concerned. In the latter the license fee is graduated according to the amount of stock on hand at the principal season of sale, whilst in

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this it is according to the number of oysters packed—the effort in each case being to require payment according to the amount of the business done in the occupation taxed.

We do not agree with the learned counsel for the appellees, that this law imposes a tax on the property and not on the occupation. In the case of the *State v. C. & P. R. R. Co.*, 40 Md. 22, relied on by him, the Act of Assembly in question prohibited coal mining companies from transporting any coal mined in this State, until a State tax of two cents per ton *on said coal* was paid. It was intended to be in lieu of all other State taxes to be paid by those companies, and expressly provided that the Comptroller should give the companies paying the tax discharges from State taxes on their capital stock. It being manifestly and confessedly a direct tax on the property, in the opinion of four out of seven Judges who sat in the case, they held the law to be in violation of the 15th Article of the Bill of Rights of this State. The other three Judges dissented on the ground that it was not unconstitutional, notwithstanding the language of the statute. This case differs widely from that, as this law simply provides for a license tax on the business or occupation of those engaged in packing or canning oysters, and not for a tax on property. In *State v. P. W. & B. R. R. Co.*, 45 Md. 361, this Court held that a tax of one half of one per centum upon the gross receipts of railroad companies was not a direct tax upon the property of the companies within the meaning of the 15th Article of the Bill of Rights. It was such a tax as might be imposed or laid "with a particular view for the good government and benefit of the community," and not such as was prohibited under the prior clause of this Article. Although that case differs from this, we refer to it as reflecting upon the character of tax, which the clause in the 15th Article of the Bill of Rights relied on refers to, as construed by this Court. See also *Rohr v. Gray*, 80 Md. 274. It is true that the burden imposed on oyster packers as a class may differ from that on other occupations, but that is

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for the sound discretion of the Legislature. An attorney at law may not pay taxes on one dollar's worth of property, and he is not now required to pay any license tax to the State for the privilege of practising his profession, whilst his neighbor, if a merchant, not only pays taxes on his stock of goods, but is required to pay a license tax before he can sell one dollar's worth of goods, yet it cannot be successfully contended that the law of this State requiring merchants to pay a license tax is unconstitutional. The Courts must leave to the sound discretion of the Legislature, which of course should be honestly exercised, the question as to what occupations shall be licensed, what rates shall be charged, &c., so long as the laws do not manifestly conflict with some provision of the Constitution of the United States or of the State. The method adopted in this case is probably as just as could be established. It is regulated by the amount of business done, and the privilege is given of paying the sum of three hundred dollars as a fixed amount, instead of being governed by the number of bushels packed. If the Legislature had arbitrarily fixed three hundred dollars as the license tax to be paid by all oyster packers, the right to do so could not be questioned. Why, then, could it not adopt as a minimum license fee, twenty-five dollars, and as a maximum, three hundred dollars, with a sliding scale between those sums, according to the amount of business done? This is practically what was done.

Again, it was contended on the part of the appellees, that if the license fee is to be regarded as a mere tax on the business of the packer, then this law embraces a subject distinct from its title and from the body of the Act. The Act of 1894, as has already been said, repealed and re-enacted Article 72 of the Code, and included all the Public General Laws on the subject of oysters to the date of its passage. It adopted various regulations for the government of those connected with the oyster business, and in doing so provided for licenses to packers. It was therefore not

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only unobjectionable, but very appropriate to include the provisions of sections 66 and 67 in this Article. They are a part of the system adopted by the Legislature to regulate, protect and preserve the oysters of the State, and hence were embraced in this Article. This is not without precedent in this State. In Article 23, title "Corporations," we find sub-divisions of "Insurance Companies" and "Insurance Department," and under the latter provision is made for licensing agents of foreign insurance companies, who are required to pay two hundred dollars per annum, and also a tax of one and a-half per centum on the premiums collected, received or secured in this State or from residents thereof, in addition to some other fees named. The State has a large revenue from that source. Nor do we see any objection to the provision of the law requiring the license fees collected of the oyster packers to be paid into the Oyster Fund. Whether the money goes into the general treasury, and any deficiency in the Oyster Fund is made up by the State out of the general fund, or whether it be paid directly into the Oyster Fund, can make no possible difference to the packers. They are really benefited by the method adopted by this law, as the money paid by them is required to be used for purposes connected with the oyster business, in which they are directly interested. If the State has the right to impose the license tax, as we hold it has, it can certainly determine what shall be done with the money, as long as no unlawful use is made of it.

Having considered the various objections urged by the learned counsel for the appellees to this law, we are of opinion that treating it as a tax on the occupation of these persons the law is not obnoxious to any of the provisions of our State Constitution, and therefore must be sustained, unless it be in conflict with the Federal Constitution, which we will briefly refer to. But little stress was laid on this ground of defence, either in the oral argument or the brief filed by the appellees. We do not see how there can be any serious question about the validity of this law, so far

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as affected by the Constitution of the United States. The law does not in any way discriminate in favor of the citizens of this State against the citizens of other States. On the contrary, it only applies to those whose places of business are in this State. Nor do we think it can be said that it in any way regulates or undertakes to regulate interstate commerce. It was suggested in argument that as the law required licenses by those engaged in packing or canning oysters for "sale or transportation," the latter clause made the law objectionable. That term was evidently used to exempt those who packed or canned oysters for their own purposes, but not for sale or transportation. Of course, oyster packers in this State may sell or transport all their oysters within the State, or they may sell or transport some of them beyond the State. But that does not prohibit the State from taxing them for the prosecution of their business within the State. It was said as early as the case of *Nathan v. Louisiana*, 8 Howard, 80, that "no one can claim an exemption from a general tax on his business within the State on the ground that the products sold may be used in commerce. No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation." Although it is sometimes difficult to draw the line between what is and what is not a regulation of commerce among the States, we have been referred to no case, and know of none decided by the Federal Courts that will bring this case within any of those classes that have been held to be in conflict with the Constitution of the United States.

Being of the opinion, then, that there is no well founded constitutional objection to the law under consideration, viewing it from the standpoint of either the Federal or State Constitution, and recognizing the right of the Legislature

under those circumstances to pass it, we must reverse the judgment below and award a new trial.

Judgment reversed and new trial awarded.

(Decided May 16th, 1895.)

SAMUEL HAWKINS *vs.* THE STATE OF MARYLAND.

Quo Warranto to Oust Incumbent from Office—Powers of State's Attorneys.

A State's Attorney has no authority to institute proceedings in the nature of a *quo warranto* in order to oust an incumbent from a public office.

State's Attorneys in Maryland possess no other powers than those prescribed by the Constitution or by statute.

Appeal from an order of the Circuit Court for Charles County (BRISCOE, C. J., BROOKE and CRANE, JJ.), overruling a demurrer to an information in the nature of *quo warranto* filed by the State's Attorney, and entering a judgment of ouster from the office of County Commissioner against the appellant. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and BOYD, JJ.

Bernard Carter and L. Allison Wilmer, for the appellant.

The State's Attorney had no power to institute this proceeding, and the demurrer should have been sustained. It is impossible to find in the judicial history of Maryland any instance of a *quo warranto* by the *Attorney-General* to oust an officer. No Attorney-General of the State has ever supposed that he had any such function. Then, where

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Argument of Counsel.

does the State's Attorney get his authority to file this information? Except when, and as empowered by statute, no State's Attorney is authorized to institute a criminal proceeding against the humblest individual. And he cannot of his own motion, start an inquiry like this, as to the validity of an Act of the Legislature concerning an office.

It is argued on the other side, that prior to the Constitution of 1851, the Attorney-General of Maryland had, by inheritance, all the powers of the Attorney-General in England, and as that Constitution abolished the office of Attorney-General, and empowered the State's Attorneys to perform its duties, therefore the State's Attorneys now have, under the Constitution of 1867, power to institute a *quo warranto* proceeding. Both the premises and the conclusion are false. In England, the Attorney-General, as representing the King's sovereignty, had that power, but the exercise of it was a matter within his discretion. It was not prescribed by law. In Maryland, before 1851, the Attorney-General was not at large; his duties were definite and prescribed by law. The power to file an information in the nature of a *quo warranto* was not among these duties. (The argument of counsel as to the validity of appellant's title to the office in question is omitted.)

Wm. Pinkney Whyte, for the appellee.

Under the common law, the Attorney-General had the right, *ex officio*, to file the petition in a case like this. *Com. v. Fowler*, 10 Mass. 290; *Goddard v. Smithett*, 3 Gray, 116; *Com. v. Allen*, 128 Mass. 310; *Shortt on Informations*, 112, 174; *Atty.-Gen. v. Delaware, etc., Co.*, 38 N. J. L. 286; *Rex v. Marsden*, 3 Burrows, 1817.

Prior to the Constitution of 1851, the proper law officer of the State was the Attorney-General, who administrated his office in the several counties of the State and the city of Baltimore, by his appointees, who were called his deputies. But the office of Attorney-General was abolished by the Constitution of 1851; and section 32 of Article 3 pro-

vided, that "no law shall be passed creating the office of Attorney-General;" and to meet this change in the law officer of the State, the Constitution in its 5th Article provided for "*an attorney for the State in each county and the city of Baltimore, to be styled the State's Attorney;*" and by the 3d section of that Article, it was provided that the "State's Attorney *shall perform such duties,* and receive such fees and commissions as are now provided by law for the Attorney-General and his deputies." It is clear, therefore, that the State's Attorney in each county and the city of Baltimore was substituted for the Attorney-General in all the duties which had, prior to 1851, appertained to his office. The office of Attorney-General has never been restored, in all its former vigor, in this State; it is true, under the Constitution of 1864, it was revived in a limited degree, that is to say, Article 5 of that Constitution created the office of Attorney-General and in its third section defined the duties of the Attorney-General, but restricted his power to initiate proceedings to cases where ordered by the General Assembly or Governor. The powers of the State's Attorneys remained the same. A careful reading of section 3 of Article 5 of the Constitution of 1864 will show that the Attorney-General has no original power to file informations, &c., as he had prior to 1851.

No change has been made in the Constitution of 1867, as to the Attorney-General and the State's Attorneys, and the provisions relating to said officers are the same as they were in the Constitution of 1864. The authority of the State's Attorney for Charles County to institute these proceedings seems to be fully established.

FOWLER, J., delivered the opinion of the Court.

The appeal in this case presents the question whether under the laws and Constitution of Maryland, the officer known as State Attorney has any legal authority to institute these proceedings, which resulted in ousting the appellant from the office of County Commissioner of Charles

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County, which office he claims to hold under the Act of 1894, ch. 215. By virtue of this Act the number of County Commissioners of Charles County was increased from three to five, and the Governor was thereby authorized to appoint "from the legally qualified citizens of said county two persons to serve as County Commissioners of said county, until the general election to be held in November, 1895, or until their successors are duly qualified and elected." In the exercise of the authority thus conferred upon him, the Governor appointed the appellant and the late William H. Trotter, the latter having died subsequent to his appointment and qualification and to the judgment appealed from. The surviving appointee, Samuel Hawkins, is therefore the sole appellant.

The demurrer to the information filed in this case presents the controlling question, and the view we have taken in regard to it, avoids the necessity of considering the other question sought to be presented, namely, the validity *vel non* of the Act of 1894, ch. 215. The Court below overruled the demurrer, declared the Act of 1894 unconstitutional, and gave judgment of ouster against the defendants, and imposed a nominal fine upon them. From this judgment the defendant Hawkins has appealed, and thus the question of the validity of information instituted by the State's Attorney for Charles County is directly presented.

In the discussion of this question it will not be necessary to inquire into the history of the ancient writ of *quo warranto*, for it ceased to exist, and as *Blackstone* says, Book III, page. 263, had fallen into disuse in England even in his time, and had given place to the more modern practice of an information in the nature of a *quo warranto*. This, as *Blackstone* calls it, "the more modern method," was adopted by the learned State's Attorney for Charles County, and we do not understand that any objection has been made to the form of the information prepared and presented by him, but the contention is that he is absolutely without power to institute such proceedings. With this

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view we all agree, and we will state, as briefly as may be, the grounds upon which our conclusion rests.

The Constitution of 1851 provided (Art. 3, sec. 32), that no law should be passed creating the office of Attorney-General, and by Article 5 of the same Constitution, provision was made for the election, compensation and duties of State's Attorneys, section 3 providing that they should "perform such duties and receive such fees and commissions as are *now prescribed by law* for the Attorney-General and his deputies, and such other duties * * as may *hereafter be prescribed by law*." It is conceded that the State's Attorney is an officer unknown to the common law, and being an officer in Maryland, created by our Constitution, it follows that his powers and duties, whatever they may be, must be derived either from the Constitution itself or laws passed in pursuance thereof.

The fact that the proceeding which was adopted in this case, has never been heretofore used in this State, except in the manner and for the purpose authorized by the Legislature, renders it exceedingly doubtful whether the right to use it or authorize its use for any purpose exists outside of that body, except as authorized by it. No instance has been found in our judicial history, where the writ of *quo warranto* or any information in the nature thereof, has ever been used or attempted to be used without Legislative authority by any of the learned members of the profession, who have from time to time, from the earliest days to the present time, filled the high office of Attorney-General of this State. In addition to this, it has been stated by Chancellor Kilty in his *Report of English Statutes*, page 248; by the late Hugh Davey Evans in his work on *Maryland Practice*. pp. 74 and 75, which for many years was a work of the highest authority in this State, and by Mr. Julian Alexander in his valuable collection of *British Statutes in force in Maryland*, p. 695 (note), that we have no proceeding by *quo warranto* in Maryland. Mr. Evans says: "The information in the nature of a *quo warranto* at common law

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would not be adapted to answer the purpose, for which it is so well fitted, when governed by statutes made expressly with a view to those purposes." "It is therefore never resorted to in Maryland, although in some of the other States, particularly in New York, where it has probably been subjected to statutory regulations, it appears to be familiar." And the fact that special provision was made by the Act of 1856, ch. 16 (Code Art. 69, sections 4 and 5), although apparently never availed of for proceeding by *quo warranto*, for the purpose of ousting defaulters from office, would seem to indicate that the power to institute such proceedings against persons holding office without authority of law did not exist, or at least was not supposed to exist outside of and independent of the statute. The sections just referred to, and section 255, Art. 23, giving the Governor power to direct proceedings to forfeit charters of corporations for the causes therein mentioned, are the only provisions of the Code authorizing any proceedings in the nature of *quo warranto* proceedings, and it is not pretended that any of these authorize the proceedings in this case.

Whence, then, is the authority derived? As we understand the argument submitted on the part of the State it is in brief, that before the Constitution of 1851 the officer then known as Attorney-General of Maryland possessed the power now claimed for the State's Attorney, and the office of Attorney-General having been abolished by that Constitution, the duties theretofore exercised by the Attorney-General were by the same Constitution imposed upon the State's Attorney by section 3 of Article 5. And that although the office of Attorney-General was revived in a limited degree by the Constitution of 1864, no change has been made in respect to the duties of State's Attorneys, either by the Constitution last named or by that of 1867. And the conclusion sought to be drawn from this statement is that the duties, which before the Constitution of 1851 were to be performed by the Attorney-General, whether *ex officio* or by virtue of law, are now inherent in and are to be performed by State's Attorney.

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Without undertaking to decide whether the power in question, under our present Constitution and laws, is in the Attorney-General, although the argument of the learned counsel for the State concedes that it is not, we think it is very clear that such power is not in the State's Attorney. It must be conceded that the duties of the Attorney-General, which it is contended were imposed on State's Attorneys by the Constitution of 1851, and the subsequent Constitutions, were those only which were then or should thereafter be *prescribed by law*. *Art. 5, sec. 3, Const. 1851.* Long prior to the adoption of this Constitution, however, namely, by the Act of 1816, chapter 247, an amendment was submitted to the Constitution of 1776, by which it was provided that the duties of the office of Attorney-General should be performed by such persons and in such manner as the General Assembly should thereafter direct. And by the Act of 1817 this amendment to the Constitution was ratified. By the Act of 1821 (1 Dorsey, *Laws*, p. 767), the duties of the Attorney-General was prescribed, and that Act remained in full force until the Constitution of 1851 was adopted. But we may search in vain for any law or Act of Assembly giving the power to or imposing the duty upon the Attorney-General to institute a *quo warranto* proceeding or any proceeding in the nature of it. See also 3 *Dorsey Laws*, p. 2464; Index, Title, "Attorney-General," and the Act of 1832, ch. 306, (2 *Dorsey's Laws*, p. 1098), providing for proceedings against corporations when authorized by the General Assembly. It appears to have been one of the conceded powers of the Attorney-General in England, *ex officio*, without the leave of any one, to institute such proceedings as the Attorney-General of Maryland was authorized to take by the Act of 1832, just referred to; but it was held by this Court in *State v. Consolidated Coal Company*, 46 Md. 1, that neither the Attorney-General of this State, nor the Governor, nor any other officer, has the right to institute *scire facias* or any other proceeding for the purpose of forfeiting charters of corporations without legis-

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lative authority. Such authority, as we have seen, was given to the Attorney-General by the Act of 1832, ch. 306, and to the Governor by the Act of 1868, ch. 471, sec. 176 (Code, Art. 23, sec. 255.) It appearing, therefore, that the Attorney-General never had the power, nor was it ever made one of his duties by any constitution or law in force in Maryland, to issue the writ of *quo warranto* or to institute proceedings in the nature thereof, and the duties of that officer which were *prescribed by law*, being the only duties which were imposed on State's Attorneys by the Constitution of 1851, and the power claimed not having been given to State's Attorneys, and the duty in question not having been imposed upon them by any Constitution since that of 1851, nor by any law of this State, they do not possess the power, and, therefore, it is not one of their duties to exercise it. Nor do these officers possess this power by the common law of England, for they are unknown to it; nor by the common law of this State, for both they and the power claimed for them are unknown to it.

Inasmuch as we do not now dispose of the question as to the right of the Attorney-General, *ex officio*, to institute proceedings like this, it will not be necessary to comment on the numerous authorities cited to establish that proposition. Nor need we refer to the authorities cited to show that the proceeding here adopted is an appropriate one for the purpose sought to be attained. As we have said, the objection on which the demurrer is based goes not to the form of the action, but to the power of the State's officer to institute it.

The Maryland cases referred to, we do not think are properly applicable to the question here presented. In *Regents v. Williams*, 9 G. & J. 426, it is said that there are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one is by *sire facias*, and the other by *quo warranto*. There is no doubt but that these remedies are appropriate, respectively, to the several conditions mentioned by the Court in that case, but, as we

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have seen, neither can be used without the express legislative authority. *State v. Consolidated Coal Co., supra.* In the case of *Harwood & Marshall*, 9 Md. 99, it was held that *mandamus* was the appropriate remedy for a party who claims title to an office, and asks for the removal of the occupant, and it being objected that *mandamus* did not lie because there was another legal remedy, to-wit, *quo warranto*, the Court, assuming that it was an available remedy in such a case in Maryland, said that it was neither specific, nor was it adequate to the object in view in that case. We do not understand the Court to say that *quo warranto*, or an information of that nature had ever been resorted to in Maryland to remove one from a public office which he was illegally holding, for such is not the fact, as we have seen. All that was said by the Court in that case, in this connection, was for the purpose of meeting the suggestion that *quo warranto* was a legal remedy, and that, therefore, *mandamus* would not lie. We think a conclusive answer to this suggestion would have been that the proceeding suggested in lieu of *mandamus* had never been authorized by the Legislature to be used in such a case in Maryland.

Reversed without a new trial.

(Decided June 18th, 1895.)

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Syllabus.

WM. J. H. GLUCK *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Eminent Domain—Condemnation of Part of Leased Property—Measure of Damages of Tenant—Abatement of Rent—Landlord and Tenant—Repairs.

When there is a leasehold interest in land taken under the power of eminent domain, the lessee is entitled to just compensation for the value of his interest, precisely as the landlord is entitled to compensation for the value of his interest ; and the sum of these values must be the full value of the property taken.

A taking of part of demised land by condemnation is not an eviction, and the tenant remains liable, under his covenant, to pay the rent originally reserved, because nothing short of a surrender, a release or an eviction will discharge him from his covenant in this behalf.

Where part only of property subject to a lease is condemned, the condemnation proceedings do not operate to abate any portion of the rent, and since the tenant remains liable to pay the whole rent, he is entitled to compensation for this element of injury.

A landlord is under no obligation to make repairs upon the demised premises, unless he has covenanted so to do.

For the purpose of widening a street, a part of a lot and building was taken under condemnation proceedings ; the front wall was torn down, and the removal of the elevator in the building was made necessary. Under the lease, which had upwards of ten years to run, the tenant was bound by a covenant to pay rent, and the landlord was under no obligation to make repairs. In the condemnation proceedings, damages for all injuries to the building had been awarded to the landlord. Upon appeal by the tenant from the award to him, *Held*,

1st. That since the tenant was bound to pay rent, although the premises were made uninhabitable, and was himself obliged to make the repairs if he continued to occupy, he was entitled to be paid the amount necessary for making such repairs.

2nd. That the fact that the full value of the property taken had been paid to the landlord was no answer to the claim of the tenant to compensation.

Appeal from the rulings of Baltimore City Court, on an appeal from the award of the Commissioners for Opening

Streets. At the trial below, appellant proved that he was tenant of certain property on Gay street under a lease for twenty years, beginning in 1885 ; that a part of such property was condemned by the appellee for the widening of said street, and also offered evidence to show the cost of constructing a new front in said premises, and making the other changes therein rendered necessary by the condemnation.

The appellant offered the following prayers :

Appellant's 1st Prayer.—When the owner of property makes a lease to a tenant, he conveys an estate in the property known as a leasehold estate, and such estate in law is entirely separate and distinct from the estate that the landlord retains. In case part of the property is taken for the widening of Gay street, the tenant remains bound to pay rent for the whole, according to the terms of the lease. In this case the city must pay to the appellant an amount equal to the value of the tenant's estate in the part taken, and an amount equal to whatever damage is done, if any, to the tenant's estate or interest in the portion of the property not taken. (Rejected.)

Appellant's 2nd Prayer.—If the jury shall find that the appellant is the lessee of the premises No. 222 N. Gay street, under the lease of April 14th, 1885, and shall further find that the elevator mentioned in the evidence will be removed in widening of said street, then the jury are at liberty to allow the appellant the cost of the removal of said elevator and its construction in another part of said premises. (Rejected.)

Appellant's 3rd Prayer.—If the jury find from the evidence that the appellant is the owner of the leasehold interest in the premises No. 222 N. Gay street, created by the lease of 1885, offered in evidence, and if they further find that in the proposed widening of Gay street a portion of the building known as No. 222 N. Gay street will be taken away, then the jury should allow the appellant such a sum as will cover the cost of repairing said building, in its diminished size, and especially of constructing a new

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front therein, but nothing shall be allowed for repairs to said building, save such repairs as may be made necessary by such widening of Gay street. (Rejected.)

The following prayers were offered on behalf of the Mayor and City Council of Baltimore:

City's 1st Prayer.—That the appellant, Gluck, is entitled in his appeal from the award of the commissioners of damages for injury to the house No. 222 North Gay street, to recover only such sum, if any, as the fair market value of his lease is impaired by the proposed improvement; that in estimating the impairment, if any, of the fair market value of his lease, they are to bear in mind that he is entitled to have his rent reduced in the same proportion that the value of his lease is reduced. (Granted.)

City's 2nd Prayer.—That the appellant, Gluck, has no right to recover for injuries done to the building known as 222 North Gay street, such damages belonging to and having been awarded to the landlord. (Granted.)

City's 3rd Prayer.—That in estimating the damages to be awarded to Mr. Gluck, the jury cannot consider either the good-will of his business or his prospective profits thereupon, or any inconvenience or loss arising from the interruption of his business, and can only award him the fair market value of his interest in the property 222 N. Gay street, the property in question, less the fair market value of his interest in so much thereof as will remain after the opening of Gay street, bearing in mind that the rent will be reduced the same proportion that the value of his lease is reduced. (Granted.)

The Court below (PHELPS, J.), rejected the appellant's prayers and granted those offered by the appellee; to which action of the Court the appellant excepted and took this appeal.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and PAGE, JJ.

James B. Guyton for the appellant.

The appellant contends: 1. That the taking of a portion of leased property in exercise of the power of eminent domain is not an eviction by title paramount and the covenant contained in the lease, to pay the rent, remains unaffected. An easement only is taken, not the fee. *Randolph's Law of Eminent Domain*, sections 170 and 304; *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198; *Folts v. Huntley*, 7 Wend. 210; *Dyer v. Wightman*, 66 Penn. St. 425; *Stubbins v. Village of Evanston*, 136 Ill. 37; *Foote v. City of Cincinnati*, 11 Ohio, 408; *Workman v. Mifflin*, 30 Penn. St. 362; *Emmes v. Feeley*, 132 Mass. 346; *Dobbins v. Brown*, 2 Jones, 75; *Kersey v. Railroad Co.*, 133 Penn. St. 234; *Railway Co. v. Scheike*, 3 Wash. 625; *Edmonds v. Boston*, 108 Mass. 535; *Balto. & Ohio R. R. Co. v. Thompson*, 10 Md. 86; *Booker v. Railway Co.*, 101 Ill. 337.

2. (a.) That the landlord is not bound to make any repairs or changes in the building on said premises in order that the same may be as conveniently arranged after, said widening as at the present time; that he is not bound to construct a new front in said premises; that there is nothing upon the face of the award to the landlord to show that he is being paid for the necessary cost of constructing a new front in said building, or constructing a new elevator therein, and that parol evidence will not be admitted to explain the award. The language of the award to the owners of the reversion is as follows: "To the estate of Samuel Hinds for the fee-simple interest in lot B." *Turner v. Williams*, 10 Wend. 140; *Patterson v. Boston*, 20 Pick. 159; *Patterson v. Boston*, 23 Pick. 425. (b.) A covenant is never implied that a landlord will make any repairs. *Moyer v. Mitchell*, 53 Md. 176; *Taylor, Landlord and Tenant*, section 329. (c.) And a lessor is entitled to rent although the premises may be destroyed by fire during the term. *Lamott v. Streett*, 1 H. & J. 29.

3. The Baltimore City Code requires that the damages

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caused to appellant's right or interest shall be awarded directly to him, he being the owner of a right or interest in the property taken. His right or interest should not be taken without just compensation. The claim that he will have a remedy in equity against a third party is not sufficient. *City Code*, section 6, Article 48, page 944; *City Code*, section 20, Article 48, page 954; *B. & O. R. R. Co. v. Thompson*, 10 Md. 86.

4. That the appellant should not be required to seek his remedy in equity. Equity will not assume jurisdiction in cases in which the remedy at law is plain, adequate and complete. And there is a constitutional right to trial by jury in cases like this. *McCoy v. Johnson*, 70 Md. 490.

Thomas G. Hayes, City Counsellor, and William S. Bryan, Jr., City Solicitor, for the appellee.

In the case at bar the landlord was allowed the value of the part of the lot taken by the condemnation proceedings for the widening of Gay street, as appears from the awards made by Commissioners for Opening Streets, which by agreement are a part of this record. The tenant, Mr. Gluck, the appellant, was therefore entitled to a proportionate abatement of his rent. The 1st prayer of the appellant, which asks the City Court to instruct the jury that "the tenant remains bound to pay rent for the whole, according to the terms of the lease," is incorrect. *Mayer, Ground Rents in Md.*, 84; *Dycr v. Wightman*, 66 Pa. St., 425; *R. Co. v. Scheike*, 3 Wash. St. 625; 29 Pac. Rep. 217; *Biddle v. Hussman*, 23 Mo. 597; *Barclay v. Picker*, 38 Mo. 143; *Liter v. Pike*, 127 Ill. 288; 20 N. E. Rep. 23.

In many jurisdictions, the mere fact that a portion of the land is taken for public use (apart from any consideration of what was allowed to the landlord), works an apportionment of the rent. *Mills on Eminent Domain*, section 69; *Kingsland v. Clark*, 24 Missouri, 24; *David v. Beelman*, 5 La. Annual, 545; *Gillespie v. Thomas*, 15 Wendell, 464;

Lewis on Eminent Domain, section 483. The measure of damages, as given in the city's 3d prayer, is fully approved by this Court in *Rice's case*, 73 Md. 308.

McSHERRY, J., delivered the opinion of the Court.

This is a proceeding by the Mayor and City Council of Baltimore to condemn, under the right of eminent domain, *part* of a lot of ground and *part* of the building thereon, for the widening of Gay street. The reversionary interest in the property belongs to the estate of Samuel Hindes, and the leasehold interest is owned by the appellant, Gluck, under a lease executed in 1885, and which expires in 1905. Gluck being dissatisfied with the award of damages made to him, appealed from the return and estimate of the Commissioners for Opening Streets, to the Baltimore City Court, where a trial by jury was had. At the close of the evidence both the city and Gluck asked the Court to instruct the jury as to the measure of damages applicable to the facts before them. The prayers presented by the city were granted, whilst those presented by Gluck were rejected, and from these rulings this appeal was taken. Compensation was made to the estate of Hindes for the fee-simple interest in so much of the lot as is required for widening the street, and the pending controversy relates only to the amount which the lessee is entitled to be paid for his leasehold interest therein. The proposed widening of Gay street will require but a part of the leased lot, and will take a portion of the building standing thereon. This will leave the building not only diminished in size, but without a front wall, and consequently untenantable. Under the lease, the tenant is bound to pay in monthly instalments the rent reserved, and there is no covenant in the lease binding the landlord to make repairs.

The owner of the leasehold, and the owner of the reversion, together hold the fee-simple estate. Each has a distinct estate or property. "The interest of a termor, in the eye of the law, is just as potential as that of the owner

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of the fee, although in fact it may not practically be so valuable." *B. & O. R. R. v. Thompson*, 10 Md. 87. These several interests are both protected by Art. 3, sec. 40 of the State Constitution, from appropriation for public use, unless just compensation, as agreed on between the parties or as awarded by a jury, shall be first paid or tendered to the party entitled to such compensation. Whatever be the method of ascertaining the values of these distinct interests, it is evident that the sum of those values must be the full value of the property taken. *N. Y. & B. Bridge v. Clark*, 137 N. Y. 95; *Burt v. Ins. Co.*, 115 Mass. 1. As the owner of each separate interest has the constitutional right to be fully compensated before his estate can be lawfully taken for a public use, he is obviously entitled to look, not to some one else for that compensation, but to the agency authorized to make, and which actually does make, the appropriation of his property. He cannot be driven to seek redress from another. Hence, it will be no answer to his demand to say that the value of his interest, or of a part of his interest, has been improvidently awarded to some one else. *Mills on En. Dom.*, sec. 70. What, then, is the measure or the standard by which the value of so much of the appellant's leasehold interest, as is needed for widening Gay street, is to be ascertained?

Primarily it would be the fair market value of his interest in the entire lot, less the fair market value of his interest in that portion which would remain after the widening of the street has been completed. *Mayor, &c., v. Rice*, 73 Md. 311. This, as a general rule, is *a priori* correct; but the Court in the case last cited was not called on, as it is by the prayers in the case at bar, to designate the particular items which properly go to make up these relative market values. The prayers on both sides in the pending appeal require such an analysis—those of the city by the exclusion, and those of the appellant by the inclusion of alleged constituent factors of damage. The specific inquiry then is, when part of the demised premises is taken,

what circumstances affect the relative market values fixed in the rule above quoted as the standards of comparison, if the tenant is bound by an unconditional covenant to pay rent, and the landlord is under no covenant to repair the buildings injured by the appropriation for the public use? This depends, first, upon whether the tenant still remains liable for the payment of the whole rent, though part of the leased premises has been actually taken by condemnation proceedings ; and, secondly, upon whether he is bound to replace the buildings partially removed or damaged, in the absence of a covenant on the part of the lessor to make repairs. These questions are raised by the prayers.

"It is incontrovertible that nothing but a surrender, a release or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant to pay rent. *Fisher v. Milliken*, 8 Barr. 111. Thus, if the premises have been wrongfully entered by a disseisor and the tenant dispossessed for the entire term, or even by the military force of a public enemy, or if they have been destroyed or rendered untenantable by earthquake, lightning, floods or fire, and thus all enjoyment by the tenant entirely lost, yet his covenant remains. *Workman v. Mifflin*, 6 Casey 369, and cases there cited. It is also equally settled that a taking by the sovereign under the right of eminent domain is not an eviction. *Frost v. Earnest*, 4 Whart. 90; *Dobbins v. Brown*, 2 Jones, 75; *Ross v. Dysart*, 9 Casey, 452; *Schuylkill & Dauphin R. R. Co. v. Schmoele*, 7 P. F. Smith, 271; " *Dyer v. Wightman*, 66 Pa. St. 427. The case last cited, and from which the above extract is quoted, was a condemnation proceeding in which the *fee-simple* was taken for the construction of a railroad. To the same effect see *Peck v. Jones*, 70 Pa. St. 85; *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198; *Folts v. Huntley*, 7 Wend. 210; *Foot v. City of Cincinnati*, 11 Ohio St. 408; *Emmes v. Feeley*, 132 Mass. 346; *Stubbings v. Village of Evanston*, 136 Ill. 37; S. C. 11 L. R. A. 839; *Corrigan v. City of Chicago*, 144 Ill. 537; S. C. 21 L. R. A. 212, and copious

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notes. In *Wash. on Real Property*, vol. 1, page 342, the author says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises where lands under lease have been appropriated to public use under the exercise of eminent domain. * * * But the better rule, and one believed to be adopted in most of the States, is that such a taking operates, so far as the lessee is concerned, upon his interest as property, for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate, according to the terms of the lease; and this extends to ground rents." In *Parks v. Boston, supra*, it was held: "Where part of a lot of land under lease is taken by the Mayor and Aldermen of Boston for the purpose of widening a street, the lease is not thereby extinguished, nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them respectively." And in *Foote v. City of Cincinnati, supra*, where the leased premises had been appropriated for a street, the Supreme Court held that the lessee was not released from the payment of rent, but that he was entitled to recover from the city the damages he sustained. Whilst there are a few cases, chiefly in Missouri and Louisiana, which hold a contrary view, the correct doctrine, both upon principle and by the decided weight of authority, seems to be that a condemnation of a part of a leasehold estate for a public use does not at law amount to an eviction; and whether the fee or a mere easement be taken, the tenant still remains liable under his covenant to pay the rent originally reserved, because nothing short of a surrender, a release or an eviction will discharge him from his covenant in this behalf. If a condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent so as to relieve the tenant of any portion of his liability to the lessor. Apportionment of the rent does not mean abatement of it; because though rent may

be apportioned, the tenant still remains liable to pay the whole of it, but in different parts to different persons, except where he has purchased or acquired the reversion of part of the demised premises. So the question recurs, not what will apportion, but what will abate the rent? The total destruction of the premises does not discharge the payment of rent, or any part of the rent, and nothing save a release, a surrender or an eviction will. A condemnation by eminent domain of part of the landlord's reversion is not in law an eviction or partial eviction, for an eviction is the act of the landlord or of a third party holding under a paramount title. *Taylor, Land & Ten.*, sec. 381. Neither is it a release, which is the descending of the greater estate upon the less; *Taylor, Land & Ten.*, sec. 507; nor is it a surrender, which is the yielding up of the less estate to him who has the reversion or remainder. *Co. Lit.* 337 b. As a consequence, then, a condemnation proceeding cannot of its own vigor on principle operate to abate any portion of the rent, and it therefore follows that notwithstanding an appropriation under the power of eminent domain of a part of the reversion, the tenant remains liable on his covenant to pay rent, precisely as he does when the entire habitable premises have been destroyed by fire. The appropriation of part of the property for a public use, leaves the tenant in the position of being deprived of a part of his property, whilst he still remains liable to pay rent for the whole of it, and to that extent obviously does him an appreciable injury, which should be considered by the jury in estimating the decreased market value of the remaining portion of the demised premises. The first and third instructions given by the Court below at the instance of the city, in terms excluded this element of damage from consideration by the jury, and informed them that the tenant was entitled to have his rent reduced in the same proportion that the value of his lease was diminished. These instructions were therefore erroneous. As the tenant's estate is entirely distinct from the landlord's and as both estates are within the protection of

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the Constitution, each must be awarded in money an amount equivalent to the value of that which is taken from him ; and as parts of the premises are taken from the possession of the tenant without thereby releasing him from his covenant to pay the whole rent, in estimating the decreased value of that portion which is left, allowance must necessarily be made for the rent to be paid for that fragment of the originally demised premises of which he is to be deprived, because the obligation of his contract to pay the entire rent is not, and under settled constitutional guarantees, cannot be impaired or abridged by condemnation proceedings which award him no compensation, or which ignore that obligation as an element of substantial injury. The appellant's first prayer which asserts this principle was therefore correct, and ought to have been granted.

It has, however, been contended that if the tenant should be allowed to recover for the full value of the leasehold interest, and the landlord should be required to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would or might in many instances result in great loss to the landlord. At best this is a mere suggestion of a possible hardship. As said by ROLFE, B., in *Winterbottom v. Wright*, 10 M. & W. 115, "hard cases, it has been frequently observed, are apt to introduce bad law." And in *Abbott v. Gatch*, 13 Md. 314, and in *Taylor v. Turley*, 33 Md. 500, this Court declined to permit considerations of great hardship to influence the rigid enforcement of established legal principles. Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may in consequence operate in some instances with apparent or even with real harshness and severity does not indicate that it is inherently erroneous. Its consequences in special cases can never impeach its accuracy.

The other circumstance which the jury should have been allowed to consider as affecting the market value of that part of the leasehold estate remaining after Gay street

has been widened, is that the building will, by reason of the widening of the street, require a new front wall, and it will be necessary to remove the elevator from its present position to some other place on the premises. The lessor is under no covenant to make repairs; and the lessee is confronted with the alternative of either abandoning the premises for which he must, notwithstanding its untenantable condition, pay full rent during the continuance of the term, or of restoring the front wall and re-constructing the elevator at his own cost and expense to make the premises habitable and available. The appellant's second and third prayers distinctly raise this question.

Now, the common law has always thrown the burden of repairs upon the tenant, though it imposes no obligation on him to make them unless he covenants to do so. *Taylor, Land & Ten.*, sec. 327. A covenant is never implied that a lessor will make them. *Moyer v. Mitchell*, 53 Md. 176; *Sheets v. Selden*, 7 Wall. 423; *Gott v. Gandy*, 2 Ellis & Bl. 845; *Pomfret v. Riccroft*, 1 Wms. Saund. 321, 322, n.; *Kramer v. Cook*, 7 Gray, 550; *Doupe v. Genin*, 45 N. Y. 123. So unvarying is this doctrine that even a Court of Equity will not compel the landlord to expend in making repairs the money received by him upon fire insurance policies after the destruction of the demised premises; unless he has expressly agreed to so apply the proceeds. Nor will a Court of Equity, when the premises have been burned down and the landlord has collected the insurance, prevent him from suing for the rent, even though he refuses to rebuild, if he be under no covenant to repair. *Leeds v. Cheetham*, 1 Sim. 146; *Loft v. Dennis*, 1 Ellis & E. 474; *Belfour v. Weston*, 1 T. R. 310; *Holtzapffel v. Baker*, 18 Ves. 115. And this is so, because a tenant is obliged to continue the payment of rent during the term, although the premises may become untenantable for want of repair, or from any other cause, or should even have been burned down in the meantime, unless he protects himself by an express covenant against liability in these contingencies.

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Lamott v. Sterrett, 1 H. & J. 29; *Wagner v. White*, 4 H. & J. 564; *Taylor, Land & Ten.*, sec. 329; *Moffatt v. Smith*, 4 N. Y. 126; *Fowler v. Bott*, 6 Mass. 63; *Bussman v. Ganster*, 72 Pa. 285; *Monk v. Cooper*, Ld. Raym. 1477. In the lease under which the appellant holds there is no covenant requiring the landlord to make repairs. Under the law none is implied. The removal of the front wall of the building, and the removal of the elevator, will materially lessen the value of the tenant's estate. The landlord is under no obligation to rebuild the wall or to re-construct the elevator. What is the consequence? If the tenant abandons the premises because they are untenantable, he must still pay the rent. If he repairs them to make them habitable, he must do so at his own cost. In either event he will be directly and seriously injured in his estate by the act of the city in condemning part of his property for a public purpose. It is self-evident that a house without a front wall will be untenantable and practically useless. But the tenant, though he may be unable to occupy the premises because the city removes the front wall, must pay his rent. He cannot compel the landlord to restore the wall, even if the landlord has been compensated by the city for doing so. "The lessee cannot maintain an action against the landlord to recover from him a certain portion of the sum assessed to him, on the ground that it was intended for the purpose of putting the property in a tenantable condition. The lessee should see to it that that item of damages is allowed to him." *Mills on Em. Dom.*, sec. 70; *Turner v. Williams*, 10 Wend. 140; *Brooks v. Boston*, 19 Pick. 174. As then the tenant is bound to repair and must rebuild the front wall to make the house tenantable, and must restore the elevator if he wishes to use it, whatever sum of money may be required for these purposes should have been awarded by the jury to be paid by the city to the tenant; and if the city has paid it to the landlord it cannot on that account escape its obligation to pay it to the tenant before taking possession of his property. It would be a strange concep-

tion of "just compensation" to the tenant if the money needed to make the house tenantable were awarded to the landlord, and the tenant to whom the injury is in fact done were left to rebuild at his own expense. Upon the plainest principles of justice, whatever cost the city causes the tenant to incur in making repairs which are rendered necessary by its acts in widening the street is a proper element of the damage he sustains and should be considered and estimated by the jury in measuring the market value of the residue of the leased premises, after the appropriation of a part of those premises for the bed of Gay street. Obviously, then, the second and third prayers of the appellant ought to have been granted, and the second instruction given at the instance of the city should have been refused.

What has been said disposes of all the questions before us, and it follows that there was error in granting the instructions asked by the city, and in refusing the prayers presented by the appellant. The rulings excepted to, will therefore be reversed and a new trial will be awarded.

Rulings reversed with costs above and below, and new trial awarded.

(Decided June 18th, 1895.)

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NOAH WEBSTER *vs.* GEORGE W. WOOLFORD.

Measure of Damages for Breach of Contract of Sale—Special Damage—Action of Deceit.

In an action to recover damages for breach of a contract of sale, the plaintiff is entitled to such damages as may be fairly considered as arising in the usual course of affairs from the breach itself, or such as were contemplated by both parties at the time of making the contract, as the probable result of a breach.

But where a contract has been made under special circumstances, and these were communicated by the plaintiff to the defendant, then the damages would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

Whether special damages may reasonably be supposed to have been in the contemplation of both parties, depends upon how much of the real situation of the parties was so disclosed at the time the contract was made as to render it a fair inference of fact that damages of that class were intended to be recovered if suffered.

Where the action is in tort, founded on a breach of a contract of sale, the measure of damages is the same as in an action on the contract, when there is no question as to exemplary damages.

The declaration set forth that defendant, professing to be a duly authorized agent of the owner, agreed to sell to the plaintiff certain property; that plaintiff, after informing defendant of his purpose so to do, sold out his interest in a business in order to obtain money to pay for said property; that defendant's representations in regard to his authority to sell were false and fraudulent, and made with intent to deceive, and the plaintiff claimed to recover damages resulting from such sale of his business, etc. Upon demurrer, *Held*, That upon these facts plaintiff was not entitled to recover the alleged special damages, since the same arise from a collateral, independent matter, in no way connected with the contract itself.

Appeal from a judgment of the Circuit Court for Dorchester County, sustaining defendant's demurrer to the declaration. The case is stated in the opinion of the Court.

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The cause was argued before ROBINSON, C. J., BRYAN,
McSHERRY, FOWLER, ROBERTS and BOYD, JJ.

Thomas W. Simmons, for the appellant.

Sewell T. Milbourne (with whom were *John R. Pattison* and *Alonzo L. Miles* on the brief), for the appellee.

ROBINSON, C. J., delivered the opinion of the Court.

This is an action to recover damages for deceit alleged to have been practised by the defendant in respect of his authority to sell certain property situate in the town of Cambridge, and known as "The Seminary property."

The plaintiff says that the defendant, professing to be the agent of the Board of School Commissioners for Dorchester County, agreed to sell to him said property at a stipulated price; and that pending the negotiations for the sale, the plaintiff told the defendant that he intended to sell his interest in the fertilizer business, in which he had been engaged for some years, for the purpose of raising money to meet the payments on the "Seminary property," and that subsequently he did in fact sell out his interest in said business.

The plaintiff further alleges, that the representations made by the defendant in respect of his authority to sell said property were false and fraudulent, and made with intent to deceive the plaintiff; and that acting on the faith of these representations he sold out his fertilizer business, in consequence of which he suffered great loss by being thrown out of business and great worry of mind, &c.

The sole question on the demurrer is whether upon the facts thus alleged the plaintiff is entitled to recover the special damage suffered by him by the sale of his interest in the fertilizer business? The action, it is true, is in the nature of an action *for tort*, but it is a tort founded on a breach of contract, and there being no question as to exemplary damages, the rule as to the measure of damages is the same as in cases for breach of contract in regard to the

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sale of property. Now, what is the rule in such cases? We take the rule to be that when two parties make a contract for the sale of property which one of the parties has broken, the other party may recover such damages as may fairly and reasonably be considered, *i. e.*, according to the usual course of business, to flow from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was made were communicated by the plaintiff to the defendant, then, in the language of the Court in *Hadley v. Baxendale*, 9 Exch. 341, "the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of a contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The first part of the rule as thus laid down applies to cases in which the damages are the direct and natural result of the breach of the contract, and which the law presumes to have been in the contemplation of both parties. The latter part of the rule applies in cases where special damages are claimed under special circumstances made known by the plaintiff to the defendant at the time the contract was made; and in such cases the plaintiff is entitled to recover such damages as may reasonably be supposed to have been in the contemplation of both parties in view of the circumstances thus disclosed.

Now, the plaintiff in this case is not claiming general damages for a breach of the contract, but special damages resulting from the sale of his *interest in the fertilizer business*,

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and these damages he claims on the ground that pending the negotiations for the sale of the Seminary property, he told the defendant that he intended to sell said interest for the purpose of raising money to meet his payments on the property. Whether special damages may reasonably be supposed to have been in the contemplation of both parties, depends in every case upon how much of the real situation of the parties was so disclosed at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if suffered, *Grebert v. Nugent*, L. R. 15 Q. B. D. 85.

The plaintiff does not allege that he *was obliged* to sell his fertilizer business in order to raise the money to meet the payments on the Seminary property, nor does he allege that he intended to go into any other business in the event of his purchase of the property. And for all that appears to the contrary, the loss suffered by him by the sale of his fertilizer business would have been the same, without regard to the breach of contract on the part of the defendant. That is to say, his loss would have been the same, even if he had purchased the property which the defendant represented himself as having the authority to sell.

And besides this, the special damages which the law presumes to have been in contemplation of the parties are damages resulting in some way from the breach of contract or wrong done, and not damages arising from a collateral and independent undertaking, in no manner connected with or dependent on the original contract, for the breach of which the suit is brought. Here the special damage claimed is one which resulted from a collateral undertaking, namely, the sale by the plaintiff of his fertilizer business, and one which cannot be said in the ordinary course of things, that is, according to our knowledge of business affairs, to have resulted from the fraud or deceit alleged to have been practised by the defendant in regard to his authority to sell the Seminary property.

And for the same reason, the facts set forth in the declara-

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tion do not bring this case within that class of cases, in which a vendor has been held liable for the loss suffered by his vendee on a sub-contract to supply goods, made on the faith of the vendor's contract, which sub-contract was made known to the vendor at the time the original contract was made. In these cases the loss suffered by the vendee on account of his sub-contract is one which resulted from a breach of contract on the part of the vendor, and which under the circumstances may reasonably be supposed to have been in the contemplation of the parties at the time of making the original contract.

There is no ground, therefore, it seems to us, on which the special damage claimed in this case can be supported, and the demurrer was in our judgment properly sustained.

Judgment affirmed.

(Decided June 18th, 1895.)

FRANK E. DAVIS *vs.* AZEL FORD AND OTHERS, A
BUILDING COMMITTEE.

Contracts—Abandonment of Work on a Building—Completion of Same at Contractor's Expense.

Where a party who contracts to erect a building within a certain time fails to do so, and abandons work on the same, not wilfully, but without any valid excuse therefor, and the other party, after notice, proceeds to have the same completed, such party is entitled to recover from the contractor the value of the work and materials necessary to complete the building according to the contract, less any unpaid balance of the contract price.

Where a building contract provided that extra work in excavating the foundation should be estimated and paid for in a certain way, and the builder, after doing extra work, but not according to the provisions of the contract, did not demand payment therefor until more than a year afterwards, and the claim being disputed, was referred

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to arbitration, such facts do not justify the contractor in abandoning work on the building, or prevent the other party from completing the same at his expense.

The fact that after a contractor has abandoned work on the building, an agreement is made between him and the owner to go on with the work, which agreement the contractor makes no effort to perform, does not furnish an excuse for the breach of the original contract.

Appeal from the Superior Court of Baltimore City. At the trial the plaintiffs offered the following prayer:

Plaintiffs' Prayer.—The plaintiffs pray the Court to instruct the jury, that if they shall believe from the evidence that the plaintiffs and defendant signed the contract offered in evidence, and that the defendant, Davis, commenced the erection of the court-house building mentioned therein and continued to prosecute work thereon until the 7th day of May, 1892, when the defendant's foreman, Layfield, left the said building unfinished and departed from the town of Raleigh, where said court-house was being erected, and that all the other workmen had previously stopped work on said court-house building, and that a copy of the notice or order dated May 4th, 1892, was sent by mail to said Frank E. Davis, defendant, and received by him on the 10th day of May, 1892. And if the jury shall further believe that the defendant did not resume work upon said court-house on or before the 23rd day of May, 1892, and that upon that date the plaintiffs took charge of said unfinished building and employed the witness, Layfield, to employ the necessary labor and purchase the necessary materials to complete said court-house building and to superintend the completion therof, at the same salary previously paid him by the defendant, and that said Layfield did purchase the necessary material and employ the necessary labor therefor, and completed the same, and that said Layfield was a competent and proper person for such employment, and that all said expenses were paid by the plaintiffs or by said county, then the plaintiffs are entitled to recover the value at the town of Raleigh, of the work and materials necessary to the com-

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pletion of said court-house building according to the said contract, less any unpaid balance of the contract price, and less the sum awarded by John Anderson for extra masonry, under the arbitration mentioned in the evidence, and also the value of extra excavation in the foundation, and also less the value of any extra materials furnished by or work done by workmen under the charge of said Layfield, and less the price of any materials sold by said Layfield from the materials provided for said building. (Granted.)

And the defendant offered the following prayers:

Defendant's First Prayer.—The jury are instructed that the plaintiffs are not entitled to recover, unless the jury shall find from the evidence that the defendant wilfully abandoned his contract and discontinued work thereunder with intent to finally quit the same; and if the jury shall find that in February, 1891, the defendant was instructed to do work and furnish materials upon the court-house not included in the contract and specifications, and that he did do such work and furnish such materials, but was not paid therefor at the time, and that the price therefor was not agreed on, and that subsequently, in April, 1892, he demanded payment therefor and that payment was refused, the plaintiffs declaring that they owed him nothing for such extra work and materials furnished; and if the jury shall further find that subsequently an agreement was entered into between the plaintiffs and defendant to refer the said claim of defendant for such extra work and materials to a certain John Anderson as sole arbitrator, and that said Anderson accepted said appointment, and that before any award was made by him the plaintiffs took possession of the unfinished court-house and employed a certain James T. Layfield to finish the same, and that they never notified the defendant of any award by the said John Anderson, and without notice to him that they had taken possession, went on with said work, notwithstanding notice from the defendant to them not to touch the said work, and that he was ready and willing to go on and finish the said court-house

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according to his contract, then the defendant cannot lawfully be treated as having abandoned the said contract so as to authorize the plaintiffs to take possession of the said court-house and complete the same at his expense, and the plaintiffs are not entitled to recover in this action. (Rejected.)

Defendant's Second Prayer.—If the jury shall find from the evidence that in June, 1892, an agreement was entered into between the plaintiffs and defendant that the matter in dispute between them in regard to the defendant's claim for payment for extra work should be referred to arbitration, and that the money payable to the defendant upon the award of the arbitrator, John Anderson, and the balance payable to him under the contract should be retained by them and disbursed by them in payment of the labor on the court-house, and that the defendant should furnish the necessary materials to finish the work; and that in disregard of such agreement the plaintiffs, without notice to the defendant, treated the work as abandoned by the defendant and went on to complete the same themselves, without informing him that on the 23rd of May they had assumed to employ James T. Layfield as their superintendent to complete the work, and that they never notified the defendant of any award by said John Anderson, and that the defendant was waiting for such award and was ready and willing to go on and complete his contract, then the plaintiffs cannot treat the defendant as having abandoned his contract and are not entitled to recover. (Rejected.)

The Court below (RITCHIE, J.), granted the plaintiffs' prayer and rejected the defendant's prayers. The jury returned a verdict for the plaintiffs for \$4,700, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and PAGE, JJ.

John Prentiss Poe, Attorney-General, and Edgar Allan Poe, for the appellant.

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James McColgan, for the appellees.

FOWLER, J., delivered the opinion of the Court.

The defendant, who is an architect and builder, agreed with the plaintiffs, who are agents of the County Court of Raleigh County, West Virginia, to supply the materials and labor and build a court-house for the sum of \$25,751. This agreement was in writing and under seal, and according to its terms the building was to be completed within sixteen months from its date, that is to say, on or before the 2nd day of January, 1892. The *narr.* alleged that the defendant failed to erect and complete said building according to the terms of the agreement, and abandoned the work; that consequently the plaintiffs were compelled to finish it, and they claim \$7,000.

On the 4th May, 1892, an order was passed by said County Court reciting that it having been made to appear to the Court that the defendant was not prosecuting the work as he agreed, it was ordered that notice be given to him to proceed with diligence to complete the building, and that if he failed to proceed with the same in ten days after such notice, then the Court, at its election, would proceed to have the same completed at his expense. A copy of this order was sent to the defendant, and he received it on the 10th of May. On the 7th May the defendant's superintendent in charge of the work closed up his accounts and left Raleigh for Baltimore, leaving the building in an unfinished condition—only two-thirds or three-fourths completed. On the 22nd May the superintendent returned to Raleigh, and was employed by the plaintiffs to finish the building. The defendant testifies that he directed him to return and resume charge of the work as his agent. The defendant failed, however, according to all the testimony, his own included, to furnish either labor or materials after the 7th of May.

The plaintiffs having finished the building after notice to the defendant to resume work, are entitled to recover,

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unless the circumstances relied on by the defendant constitute a defence or valid excuse for his abandonment of the work. His defence is that not having been paid for certain extra work he had a right to stop work on the building until paid; and, secondly, that in June, 1892, after the alleged abandonment, the plaintiffs agreed that he should furnish the necessary materials to complete the work.

The contract itself provides that if in excavating for the foundations it should become necessary to excavate deeper than shown by the drawings to get a solid foundation for the walls or any part thereof, that measurements should be made at the time to ascertain the exact amount of additional excavation, masonry, labor and materials, which were to be valued and paid for as an extra at such prices as should be agreed upon before the work should be done, otherwise no payment was to be made for such extra work. On the 24th February, 1891, the plaintiffs informed the defendant's foreman that they had decided that the foundations should be made twelve inches deeper than provided in the specifications. It appears that the extra work was done, but without any agreement as to price, as provided in the contract. And in April, 1892, more than a year after this extra work was finished, the defendant for the first time demanded a settlement for it. In the meantime he had been paid more than the whole amount he was entitled to up to the time of completion of the building, which the testimony shows was only about two-thirds done when abandoned by the defendant. Although the plaintiffs deny that they refused to pay for extra work, it is not surprising that under the circumstances they may have been unwilling to pay anything more to the defendant on account of his work. The defendant says, that upon the refusal of the plaintiffs to pay his claim for extra work, he protested against such injustice and declared to them that if they refused to allow for extra work after ordering it, their contract was worthless. And he seems to have acted upon this view, for very soon thereafter the work appears practically aban-

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doned by him. Early in June the defendant went to Raleigh, and there entered into a written agreement to refer to arbitration his claim for extra work ; and he testifies, although contradicted flatly by the plaintiffs, that at the same time he had an understanding with them that he would furnish all the materials from Baltimore to finish the work, and that he was ready to go on and complete the same. The arbitrator subsequently ascertained the amount due the defendant to be \$716.25, and this was allowed him as a credit against the plaintiff's claim.

It is admitted that the instruction given at the instance of the plaintiff is in itself unobjectionable. But it is contended that the prayers offered by the defendant should also have been granted in connection with that of the plaintiff. But we do not agree to this view. The defendant's first prayer contains this proposition, that the plaintiffs are not entitled to recover unless the jury shall find that the defendant wilfully abandoned his contract and discontinued work thereunder, with intent finally to quit the same. The question here, however, is not whether the abandonment was wilful, but whether it was under such circumstances as afford the defendant a legal excuse for the violation of his contract. *Gill & McMahon v. Vogler*, 52 Md. 665. The abandonment may have been free from wilfulness, and yet, if the circumstances on which the defendant relies for a justification do not constitute a legal excuse, the plaintiff should recover. The remaining proposition contained in this prayer, as we understand it, is that if the plaintiffs and defendant agreed to refer to arbitration the claim for extra work, the plaintiff had no legal right, notwithstanding all the other facts in the case, to take possession of and complete the work at defendant's expense. The matter, however, referred to arbitration was entirely distinct from the main contract, according to the terms of which the very claim to be arbitrated had no foundation whatever. The defendant certainly should not be excused from performing his part of the

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original and subsisting contract because of a difference between him and the plaintiffs as to a matter extrinsic and foreign to it.

The second prayer of the defendant is based upon his own testimony to the effect that in June, 1892, there was an understanding between him and the plaintiffs that whatever the amount found due him by arbitration should be added to the balance due on the contract price, and the whole amount should be disbursed by the plaintiffs in payment of labor, and that he would furnish all the materials from Baltimore for the completion of the building, and that he was ready to go on and complete the work. Upon this evidence the defendant asked the Court to instruct the jury that if they found such understanding was had between the parties, that the defendant was justified in abandoning the work, and that the plaintiff had no legal right to take charge of the work before the award of the arbitrator was filed. But we think it clear such an instruction is not warranted by the facts of this case. For even if it be conceded, as it is in considering this prayer, that such an understanding was had, yet it must be remembered that all the testimony shows that the defendant never took any steps to comply with his part of the understanding. He never furnished or offered any materials for the work from the time he gave up the work to the time of trial of this case. All he did after the 7th of May was to send an agent to Raleigh without furnishing him with any means whatever of prosecuting the work. The existence of the alleged contract made in June, can afford the defendant no excuse for failure to perform the original contract, if he was not in fact able and never made any *bona fide* effort to perform his part of the June contract. Undoubtedly, if in June the parties made the contract in question, and it was agreed it was to take the place of or be a modification of the first contract, a different case would have been presented. But there is no such case before us. We think the facts were fairly put to

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the jury in the instruction given by the Court, and finding no error the judgment will be affirmed.

Judgment affirmed with costs to plaintiffs.

(Decided June 18th, 1895.)

WILLIAM STEARNS *vs.* THE STATE OF MARYLAND.

Criminal Pleading—Duplicity—Charging Offence Disjunctively—Negating Exception in Statute.

The Act of 1894, ch. 232, making it unlawful to gamble or make pools on the result of any horse race, etc., contained an exception providing that it should not be unlawful to make a pool or bet within the grounds of any agricultural association upon a race held within the same on the same day. A criminal information against the defendant charged that he made pools, etc., in this State on the result of a race at Sheepshead Bay in the State of New York. *Held*, That such averment sufficiently negated the exception in the statute.

The said Act provided that it should be unlawful for any person to gamble or make books and pools on the result of any trotting race or running race of horses, or race of any kind, or to keep or use or knowingly suffer to be used any house for the purpose of making or selling any book or pool, or otherwise betting upon the result of any trotting race or running race. The information against the defendant charged that he unlawfully made books and pools on the result of a trotting race or running race of horses on a certain race track ; that he unlawfully kept a house for the purpose of making or selling pools on the result of a certain trotting or running race ; that he used a house for said purposes, etc. Upon demurrer, *Held*, that the information was bad for duplicity, in that it charged the alleged offence disjunctively or in the alternative.

Appeal and writ of error from the Circuit Court for Anne Arundel County. The case is stated in the opinion of the Court.

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The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, JJ.

Robert Moss and Daniel R. Magruder, for the appellant.

The information contains five counts. None of the counts negative the exception contained in the enacting portion of the Act, and this omission is fatal to the information. See *State v. Nutwell*, 1 Gill, 54; *State ats. Bode*, 7 Gill, 330; *Rawlings v. State*, 2 Md. 211; *Barber v. State*, 50 Md. 167. It is not alleged in any of the counts that a race was actually run. *2 Humphrey's Tenn.*, page 424.

Under the information as drawn, it was impossible for the traverser to know for what offense he was called upon to make defense. In each count it is alleged disjunctively that the race upon which the pool was sold, book made, betting or gambling done was a *trotting race or running race* without alleging either. *Wharton's Criminal Pleading and Practice*, 9th edition, page 112, and cases there cited; *Bishop's Criminal Pleadings*, vol. 1, page 352; *State v. Nutwell*, 1 Gill, page 42; *Capritz v. State*, 1 Md. 573; *Spielmon v. State* 27 Md. 523. The first, third and fifth counts do not even allege the kind of race run or the animals that participated.

John Prentiss Poe, Attorney-General, for the appellee.

The information is not defective because it failed specifically to allege whether the race was a "trotting race or a running race." Such particularity ought not to be required. For the purposes of the statute, it is wholly immaterial whether the race was a "trotting race or a running race." The essence of the offence charged, is that the appellant did gamble on the result of a horse race at Sheep's Head Bay; that he did bet on the result of such race; that he did make and sell books and pools on the result of a horse race; that he did keep a house for the purpose of making or selling therein, books or pools, or betting therein, on the result of horse racing; that he did use a house for such purposes, and that he did knowingly suffer a house to be used for

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such purpose. All these distinct acts are charged against him in the five counts of the criminal information. All of them are admitted by the demurrer, and certainly it would seem like sticking in the bark to hold that the information is defective, because it does not distinctly allege whether the race upon which the bets were made, was a "trotting race or a running race." It was a horse race, and whether one or the other, the statute equally applies, for it is to be observed that the language of the Act is, "*any trotting race or running race of horses or race of any kind.*"

BRISCOE, J., delivered the opinion of the Court.

The appellant was tried and convicted in the Circuit Court for Anne Arundel County under a criminal information filed by the State's Attorney for that county for unlawfully gambling, contrary to the Act of 1894, chapter 232. The information contains five counts. The first charges the appellant with unlawfully gambling on the result of a certain trotting race or running race on the Sheepshead Bay race track, in the State of New York; second, with unlawfully making books and pools on the result of a certain trotting race or running race of horses on the same race track; third, with unlawfully keeping in Anne Arundel County a certain place, to-wit, a house for the purpose of making or selling therein books or pools or *betting therein* on the result of a certain trotting race or running race on the same race track; fourth, for using a certain place there, to-wit, a house for the purposes aforesaid; and fifth, unlawfully did knowingly suffer such house to be used for the purposes aforesaid.

To these counts a general demurrer was interposed which was overruled by the Court. The appellant then waived his right to plead over, was convicted and from the judgment so entered against him this appeal has been taken. The main grounds of error assigned and relied upon by the appellant are: 1st. Because the information omits to negative the exception contained in the proviso of the statute.

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2nd. Because the information did not allege the kind of race upon which the book or pool was sold or bet made, but charged the same in the alternative as being a trotting or running race, without specifically alleging the one or the other, and 3rd. Because of duplicity, in that each count charges several distinct offences.

In support of the first objection it is contended that the information is defective, because all the counts omit to negative the exception contained in the statute (Act of 1894, ch. 232), which provides that nothing in this section shall render it unlawful for any person to make a pool or a book or to bet within the grounds of any agricultural association or upon any horse race which shall be held within the same grounds within a limited period. But this objection we are of opinion cannot be sustained. The averment in each of the five counts of the information distinctly sets forth that the offence was committed in Anne Arundel County, while the race was at Sheepshead Bay race track, in the State of New York. The allegation that the race took place at a certain race track in the State of New York manifestly negatives the exception in the statute that the race was held within the grounds of an agricultural association within this State. Where a statute contains an exception so incorporated in its enacting clause that the one cannot be read without the other, the indictment or information must negative the exception. But when, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as matter of defense. But in this case the exception contained in the proviso of the statute is sufficiently negatived by the averment in the information itself.

The second and third objections made by the plaintiff in error to the information we however think are well taken. The Act of 1894, chapter 232, upon which this information is based, provides that it shall be unlawful for any person or persons or association of persons to *gambol* or make *books* and *pools* on the result of any *trotting race* or run-

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ning race of horses, or *race of any kind*, or to establish, keep, rent or use, or knowingly suffer to be used or occupied, any house, building or portion of a building, vessel or place, on land or water, for the purpose of making or selling therein any book or pool or of otherwise betting therein or thereon, upon the result of any trotting race or running race of horses or race of any kind, except upon the grounds of any agricultural association within a limited period in any one calendar year. Now, it is well established that certainty to a reasonable extent is an essential requirement of criminal pleading where conviction is followed by penal consequences. One of its objects is notice to the party of the nature of the charge, so as to enable him to defend against a second prosecution of the same crime by pleading a former acquittal or conviction. The certainty required in an indictment, says Mr. Bishop in his work on Criminal Procedure, depends often upon properly choosing between "and" and "or" as the conjunction, and he lays down the rule that whenever the conjunction "or" would leave it uncertain which of two things is meant, it is inadmissible, and in its stead "and" may be employed. If a statute makes it a crime to do this or that or that, mentioning several things disjunctively, all may indeed, in general, be charged in a single count, but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain. Therefore an indictment upon a statute of this kind may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or" and it will not be double, and it will be established at the trial by proof of any one of them. *Bishop on Criminal Procedure*, sections 436-586; *Archbold's Crim. P. & P.*, vol. 1, 283, note 1; *Wharton's Crim. P. & P.*, 161; *Chit. Crim. Law*, 231, and cases there cited; 10 Amer. & Eng. Encly. of Law, 599.

And in *Leath v. Commonwealth*, 32 Grattan, 873, the Court of Appeals of Virginia in passing upon an indictment upon a statute, a case somewhat similar to the one here,

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says: "The Court pursues the language of the statute in describing the enumerated games or tables, except that it substitutes the conjunctive "and" for the disjunctive "or," and in so doing it charges really but one offence, to-wit, the keeping and exhibiting all the games or tables named at the same time and place, and such count is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned." And in *Tierman's case*, 4 Gratt. 545, it was held that an indictment charging in conjunctive form an unlawful playing and betting, where the statute made it unlawful to play or bet, was not bad for duplicity. And the cases of *Rasnick v. Com.*, 2 Va. cases, 356; *Wingard v. State*, 13 Geo. 396; *Hinkle v. Com.*, 4 Dana, 518; *Ainsworth v. U. S.*, 1 Appeal Cas. D. C. 518, and numerous decisions in other States are to the same effect.

It seems to us, then, that the information in the case here is clearly defective for duplicity. In all of the five counts the alleged offence is charged disjunctively or in the alternative. The pleader could have inserted separate counts charging the several offences, and the party would have been convicted if warranted by the proof of either offence; or the conjunctive "and" could have been substituted for the disjunctive "or" where there was one offence, and as we have seen, the information would not have been bad for duplicity or repugnancy. But it is insisted upon the part of the appellee, that assuming the first and second counts to be defective, the offence of keeping or using, or suffering to be used, a house for the purposes prohibited by the statute, is sufficiently alleged in the third, fourth and fifth counts of the information. It will, however, be observed that the offence under the statute is for keeping a house for some one of the purposes mentioned therein, and all of these purposes are distinctly alleged in each count in the disjunctive or alternative. It is therefore sufficient to say that they are equally open to the same objection as applies to the first and second counts, for the reason heretofore assigned by us.

The demurrer will therefore be sustained, and the judg-

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ment reversed. This reversal, however, does not relieve the party from further liability. He was not tried on a valid information and was not put in jeopardy. He can be re-arrested, and upon a new information can be tried again. *State v. Williams*, 5 Md. 82; *Hoffman v. State*, 20 Md. 425.

*Judgment reversed and information
quashed with costs.*

(Decided June 18th, 1895.)

JAMES MONROE ZIMMERMAN *vs.* MORRIS B.
HAVER AND OTHERS.

Construction of Wills—Declaration of Testamentary Intention—Erroneous Recital in Will—Devise by Implication—Disinheriting Heir—Reference to Other Instrument.

Evidence of the declarations of a testator are inadmissible to establish his testamentary intention or to aid in the interpretation of his will.

If a will does not itself purport to make a particular devise, then no matter how plainly it may appear by some other paper that the testator designed that title should pass to certain property, it does not pass under the will, in the absence of apt words, or of a clear intent, that the title should pass by the will and not by the other paper.

If an erroneous recital in a will be of a gift contained in the same instrument, the recital may operate as being in itself a devise or bequest by implication of that very property. But where the erroneous recital refers to an estate created by another instrument, such recital cannot operate to create an estate by implication.

An explicit declaration in a will that the heir shall not inherit, is wholly ineffectual to defeat his right, unless there be a valid devise of the estate to some one else.

A executed a voluntary deed conveying certain land to B, and on the same day he made a will in which, after reciting the execution of the deed, he gave and bequeathed to B all his personal property of every description, and declared that he thus gave all his estate to B, "because he is married to my niece, and I have been living with them for

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many years, and have a high regard and affection for them, and desire that they shall enjoy the same to the exclusion of my other relatives." A few days after the execution of the deed and will, the testator died, and upon a bill in equity against B by the heirs at law of A the deed was vacated, because it had been obtained by undue influence. B was in possession of the land and then filed a bill *quia timet* to have his title to the same established under the will, and to restrain the heirs at law of A from asserting title. *Held,*

- 1st. That B had no title to the land under A's will, because the same does not purport to dispose of real estate or to devise the land in the event that the deed should not be operative.
- 2nd. That the expression in the will of the testator's desire that B should enjoy the property cannot operate as a direct devise or as a devise by implication, because the whole clause pre-supposes that the land had been disposed of by the deed, and there was no intention to give the same by the will.

Appeal from a *pro forma* decree of the Circuit Court for Washington County dismissing the appellant's bill of complaint. The case is stated in the opinion of the Court. The will of John Bitner, duly admitted to probate, under which the appellant claimed title to the property in question, was as follows, after the introductory clause :

"Whereas, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto him, the said James Monroe Zimmerman, all my personal property of whatever description and wheresoever situate. I thus give to the said J. Monroe Zimmerman all my property and estate, because he is married to my niece and I have been living with them for many years, and have a high regard and affection for them, and desire that they shall enjoy the same to the exclusion of my other relatives."

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, ROBERTS and BOYD, JJ.

Alexander Neill and J. Clarence Lane, for the appellant.

The testimony abundantly shows such surrounding facts and circumstances as would presumptively lead the testator

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to do precisely what he did do, provide both by will and deed for the transfer of his property and estate to the man for whom he had for years intended it. "The Court should be placed in possession of all the surrounding facts and circumstances connected with the testator, and which tend to show his relation to the persons and things to which his devise may refer." *Stokeley v. Gordon*, 8 Md. 496; *McCorm v. McCorm*, 100 N. Y. 511.

That there is a gift by implication from the whole will, and especially from the clause expressing the desire that they should enjoy his property to the exclusion of his other relatives. *Beach on Wills* § 335; 2 *Roper on Legacies*, 350. "A gift may arise from implication, but the implication must be a necessary one. The probability of an intention to make the gift implied must appear so strong, that an intention contrary to that which is implied can not be supposed to have existed in his mind." *Bishop v. McLellan*, 44 N. J. Eq. 450; (1 L. R. A. 551); *Post v. Hover*, 33 N. Y. 599; *Ridgely v. Bond*, 18 Md. 433; 448. "There may be a legacy by implication, but to raise such implication, it must be necessary to do so in order to carry out a manifest and plain intent of the testator, which would fail unless such implication be allowed." *Bartlett v. Patton*. 33 W. Va. 71; (5 L. R. A. 523.) "A devise by implication will be upheld when it is manifestly intended by the testator, although not made in formal language." *Masterson v. Townshend*, 123 N. Y. 458; (10 L. R. A. 816 & n.) "Where, from the language of a will, there is no doubt of the testator's intention, the mandatory provision may be broadened and supplied by the Chancellor, in order to carry out the intention of the testator." *Peynado v. Peynado*, 82 Ky. 5. "A declaration by a testator in his will of his having given something, though in fact he had not, is sufficient evidence of his intention to give and amounts to a gift." *Beach on Wills* § 335; *Smith v. Fitzgerald*, 3 Ves. & B. 7; *Marsh v. Hague*, 1 Edw. Ch. 174.

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Norman B. Scott, Jr., (with whom were *Alexander Armstrong* and *W. J. Zacharias* on the brief), for the appellees.

The plaintiff in this case had the right, and it was his duty, to avail himself of all the defences that he could make, as defendant in the other case. He elected to stand upon the deed and that alone, and he can not now come in in this suit and set up a matter that he could have used in the other case. *Walsh v. C. & O. Canal Co.*, 59 Md. 427; *Aurora v. West*, 7 Wall. 82.

In the present case the plaintiff has offered a great mass of testimony consisting largely of alleged declarations made by John Bitner in his lifetime to the different witnesses to the effect that he intended J. Monroe Zimmerman to have his farm, to all of which testimony exceptions have been taken by the defendants. Such evidence is clearly inadmissible. There is nothing uncertain, ambiguous or obscure in John Bitner's will. His intention and purpose are made clear by the terms of the will itself, and extrinsic evidence is never admissible to show a different intention from that the will discloses. *Hawman v. Thomas*, 44 Md. 43; *Warner v. Miltenberger*, 21 Md. 264; *Hammond v. Hammond*, 55 Md. 581; *Kelleher v. Kernan*, 60 Md. 447; *McAleer v. Schneider*, 2 App. Cas. D. C. 461.

The will is plain on its face. It does not dispose of the farm, and from a careful reading and analysis of its terms it is manifest that John Bitner never intended that it should. But even assuming that the word "*thus*" as used in the will is intended to apply to and include the introductory sentence, wherein he states that he has made a deed of the farm to Zimmerman, it can not be argued for one moment that he intended thereby to dispose of the farm by the will. On the contrary, it emphasizes the conclusion that he did not do so and did not intend to do so. In using the terms, "I thus give," &c., he only intended to refer to the *manner* in which he had given his property, viz., the farm by the deed, and the personal property by the will, and then follow the reasons for his so disposing of them, and in the expression

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"desire that they shall enjoy the same," it can only mean that he desired that they should enjoy it in the *manner* in which he had disposed of it. It is again submitted, however, that upon a careful reading of the whole will nothing is disposed of under it but the personal property, and that the explanatory clause refers to that and that alone.

McSHERRY, J., delivered the opinion of the Court.

On the twenty-second day of February, eighteen hundred and ninety-two, John Bitner made, executed and duly acknowledged a deed of gift conveying to James Monroe Zimmerman a valuable farm lying in Washington County; and afterwards, on the same day, he executed and published his last will and testament, whose exact words and provisions, in so far as they relate to the pending controversy, will be set forth in full later on. Five days after the execution of these two instruments Bitner died. Shortly thereafter the deed was placed on record, and then the sister and other heirs at law of the decedent filed a bill in equity against the donee Zimmerman, alleging that the deed had been procured by undue influence, and praying that it be cancelled, set aside and annulled. Upon final hearing a decree was passed vacating the deed, and upon appeal to this Court that decree was affirmed on the fourteenth day of March, 1894. *Zimmerman v. Bitner et al.*, 79 Md. 115. On the thirteenth of the following June, Zimmerman filed a bill on the equity side of the Circuit Court for Washington County, alleging that since the death of John Bitner, he, Zimmerman, had been in possession of the farm above referred to, claiming title thereto under the provisions of John Bitner's *will*; and further charging, that the heirs at law of the testator dispute the validity of that will, and threaten to oppose the plaintiff's title to the farm thereunder. The relief prayed was that the will might be construed; that the plaintiff's title to the land might be declared to be an absolute fee-simple title *under the will*, and that the defendants might be restrained by injunction from asserting

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as heirs at law of John Bitner, any title to the farm. A *pro forma* decree dismissing the bill was passed by agreement, and thereupon this appeal was taken.

The material parts of the will are in these words: "Whereas, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto him, the said James Monroe Zimmerman, all my personal property of whatever description and wheresoever situate.

"I thus give to the said J. Monroe Zimmerman all my property and estate because he is married to my niece, and I have been living with them for many years, and have a high regard and affection for them, and desire that they shall enjoy the same to the exclusion of my other relatives."

The sole question to be considered is, whether Zimmerman, having failed to establish a title to the farm under the deed of gift under which he at first claimed, but which was annulled in the former proceeding, can successfully assert any title thereto under the above cited provisions of the will. As indicating what Bitner's testamentary purpose was a large mass of testimony was taken to prove John Bitner's declarations covering a number of years; but this evidence is clearly inadmissible either to establish what his testamentary intention was, or to aid in the interpretation or construction of his will. Just as he has written his will, it must stand. What he meant to say must be gathered from what he did say therein, as viewed from the standpoint that he then occupied; and what he did say in the will itself, and not what he previously declared, no matter how unequivocal its import may be, must solve the question before us. In construing a will effect is undoubtedly to be given to the intention of the testator, if that can be done without violating any legal principle. But to what intention must effect be given? That manifested in some other paper not made a part of the will? or that disclosed on the face of the will? If to the latter, as is incontestably the case, then there must be apparent on

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the will itself an intention to do something *by* the will; and if the will does not undertake or purport to do a particular thing—to make a particular devise—then no matter how plainly it may appear by some *other* paper that it was designed title should pass to certain property, the will cannot be held to pass that title in the absence of apt words to carry it, or in the absence of a clear intent that title should pass, not by the other paper, but by the will.

It is perfectly obvious that the will makes no direct disposition of the real estate. It expressly recites that the testator had on the same day conveyed the farm to Zimmerman by deed, and it then proceeds to give to him, not the farm, but personal property only. Having done this the testator immediately assigns, in the next paragraph, a reason for what he had done—that is to say, he explains why he had given the real estate by the deed and the personal property by the will—but there is nothing in the language thus employed to indicate the most remote intention to give anything whatever by this purely explanatory clause. After first stating that he had made the deed conveying the farm, and then distinctly bequeathing his personal estate, he declares, not by way of further devise or bequest, but by way of explanation of what he had already done, “I thus give to the said J. Monroe Zimmerman all my property and estate, because he is married to my niece, &c.;” and he then expresses his desire that they, the beneficiaries, “shall enjoy the same”—the real estate given by the deed and the personal estate given by the will—“to the exclusion of my other relatives.” But if the deed failed from any cause to convey the land, the mere expression in the will of a wish, that the donee should enjoy that which the testator then supposed he had given him by the deed, cannot operate as a direct devise of the land, or as a devise thereof by necessary implication, even though coupled with a declaration that he desired his other relatives to be excluded from any participation in his estate. If the deed had been sustained, Zimmerman would have held title under it and not under

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the will. Clearly he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed he would then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee-simple. If it had effectively conveyed a fee, then it would have divested the grantor's whole interest in the property, and having been executed prior to the will, there would have been no estate left in the grantor for the will to operate upon. But as the deed was in form sufficient, had it been allowed to stand, to convey to the donee the grantor's entire title to the farm, the will, which does not purport or even inferentially profess to give the same farm to the same or to any other person, in the event or on the contingency that the deed should fail to be operative, cannot, upon any known rule of construction, be interpreted as alternatively disposing of the property that failed to pass under the deed. The deed was stricken down because it was void, and it was void because it had been procured by undue influence. It was consequently tainted from the beginning. Now, the recital in the will following the word "whereas," is to the effect that the testator had, by an instrument other than the will given to Zimmerman, the farm named in the recital; but in truth and in fact, though he had executed the deed, he had not, by reason of the deed's invalidity, conveyed that property to Zimmerman at all. This recital in the will was, or at least turned out to be, erroneous, because the deed did not convey the title, though it was actually made and executed. Such an erroneous recital does not disclose a purpose or intention on the part of the testator to give the same property by the will.

The doctrine as to the effect of erroneous recitals in wills is well established, namely, that if the erroneous recital in a testamentary instrument be of a gift contained in this instrument, the recital may operate as being in itself a devise or bequest by implication of that very property. But where the erroneous recital refers to an estate created by another

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instrument, that recital cannot operate to create an estate by implication. *Harris v. Harris*, Ir. R. 3 Eq. 610; *Adams v. Adams*, 1 Hare, 538; *Holten v. Den*, 23 N. J. L. 330; *Hurlbut v. Hutton*, 42 N. J. Eq. 15; *Hunt v. Evans*, 11 L. R. A. 185. In any event the implication must be a necessary one. *Ridgely v. Bond*, 18 Md. 448. Mr. Theobald, in his *Treatise on Wills*, p. 420, classifies implications by recital, two of which are: (1.) "A recital that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Harris v. Harris*, Ir. R. 3 Eq. 610; *Circuit v. Perry*, 23 B. 275. (2.) But a recital that the testator has by the very instrument containing the recital made a particular gift which he has not in fact made, is evidence of an intention to confer the bounty. *Adams v. Adams*, 1 Hare, 537." Thus where a testator bequeathed unto A, his wife, £600 to be paid to W., saying it was for payment of lands lately purchased of W., *and was already estated as part of a jointure to A, his wife, during her life*, being of the value of £67 per annum; that of Wiskow, York and Malton, the lands there amounting to the yearly value of £63, in all £130, which *being also estated upon A, his wife, was in full of her jointure*. It appeared that these lands had not been settled on the wife. It was held by POLLEXFEN, C. J., ROKEBY and VENTRIS (POWELL, J., *dissentiente*), that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was estated in it before." 2 *Jur. Wills*, ch. 17, p. 105; (5th Am. Ed.)

The recital in John Bitner's will has no reference whatever to a gift or devise created *by or under the will*, but it refers solely to a gift by deed in no manner connected with the will at all, and consequently that recital has no efficacy to pass the property as a devise by implication.

The *desire* expressed in the explanatory clause to the effect that Zimmerman and his wife "shall enjoy the" prop-

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erty, cannot operate either as a direct devise of the land or as a devise thereof by implication ; because the whole clause containing these words necessarily pre-supposes that both the real estate and personal property had been previously disposed of ; the one by the antecedent deed, the other by the preceding item of the will. To make this clause operate as a devise of the real estate by implication, a construction must be put upon it which imputes to the testator an intention he manifestly never had, namely, an intention to dispose of the land by the will and not by the deed. A devise by implication strictly arises where the devisor, meaning to part with his interest, parts expressly with a portion of it only ; and the question is, whether that which is not in terms given is by the effect of the will taken altogether disposed of. Where, for instance, an estate is given to B after the death of A, the question is, what is done with it, or whether anything is meant to be done with it during A's life. If B is the heir at law, of necessity A must take the intermediate interest, though not disposed of, as the heir at law cannot take during the life of A. *Dashwood v. Peyton*, 18 Ves. 27. Obviously, then, when the testator does not undertake to give by his will *any* portion of his estate in a particular parcel of property, there can be no gift by implication of his *whole* estate therein. There being no gift of any *part* of it there is nothing to found the implication on that a gift of the *whole* of it was intended. In the total absence of even a partial disposition of the property, if it be held that the whole of it passes because of the use of words excluding other persons than the one making claim, this would be conjecture and not implication at all. And when to this condition is added the further manifest intention that the particular property should pass by some other instrument, not only can no devise by implication arise, but a devise of any kind is unequivocally rebutted.

It is true that in some instances Courts have upheld a devise by implication where it has been very apparent and necessary to give effect to the plain intention of the testator.

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But in cases of this character the implication must be obvious, and not merely possible or probable; for the title of the heir at law being plain, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification. *Ridgely v. Bond*, 18 Md. 448; *Cruise Dig. Title, Devise*, ch. 10, sec. 18.

Nor is the appellant's contention strengthened by the expressed desire that the testator's other relatives should be excluded from participating in the distribution of his estate. And this is so, because, as said by LORD MANSFIELD in *Denn Gaskin, Coup.*, 657, "though the intention to disinherit the heir be ever so apparent, he must, of course, inherit, unless the estate is given to somebody else; and the reason is that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently." See *Coffman v. Heatnole*, 2 L. R. A. 848, and notes. An explicit and unequivocal declaration, therefore, that the heir shall not inherit, will be wholly ineffectual to defeat his right, unless the estate be given by the will to some one else. Hence, no matter how emphatically the testator asserted that he did not wish his other relatives to have any portion of his estate, still, as he failed by the will to devise his real estate to any one, it passed by operation of law to John Bitner's heirs upon the deed being stricken down.

Much was said in the argument about the duty of the Court to construe the will as persons of ordinary intelligence would construe it, and we were strenuously urged "to do simple justice to the plaintiff in this case." In *Ralph v. Carrick*, 5 Ch. D. 984, SIR H. COLTON pointed out the fallacy that subject to established rules, the duty of the Court was to construe the will as a person of ordinary intelligence would do. "Of course," said the Lord Justice, "we are bound by the rules which have been established by the Courts to enable us to say what the words used do mean. Subject to that we are bound to construe the will as trained legal minds. And that differs from the mind of an ordinary

person in this way, that even persons of ordinary intelligence not so trained, are accustomed to jump at the conclusion as to what a person means by the words he uses, by fancying he must have done what they under similar circumstances think they would have done. That is conjecture only; and conjecture on an imperfect knowledge of the circumstances, because, although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds or in evidence before them, or that the testator's mind was in any way constituted, as regards the attention he paid to the rights and claims of the different parties dependent upon him, as their minds are constituted, or that he would have acted in the same way as they. Therefore, as lawyers, we must construe the will like any other document," with one difference only, viz., that technical words are unnecessary in a will. *2 Jar. on Wills*, 115 (5th Am. Ed.)

There being no error in the *pro forma* decree dismissing the bill of complaint, it will be affirmed with costs above and below.

*Pro forma decree affirmed with
costs above and below.*

(Decided June 18th, 1895.)

BARBARA YOUNG *vs.* THE COLLEGE OF PHYSICIANS AND SURGEONS AND OTHERS.

Coroners—Inquests—Making Autopsy Without Consent of Family of Deceased—Evidence.

Under the local law of Baltimore City, the coroners have power to hold inquests and order autopsies to be made, when, in their judgment, an autopsy is an appropriate means of ascertaining the cause of a person's death.

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And in such case a coroner may lawfully order an autopsy to be made without the consent of the family of the deceased.

A physician who makes a *post-mortem* examination in the usual manner and in pursuance of the authority of the coroner, is not liable in an action to the family of the deceased for the mutilation of his body without their consent.

A man in vigorous health, whose leg was crushed below the knee in a railroad accident, was carried to a hospital managed by one of the defendants, where he died the next day. The coroner was notified, and considering that the accident was not of itself sufficient to cause death, he ordered a *post-mortem* examination to be made. This was accordingly performed by the defendant K., but without the knowledge of the family of the deceased. In an action by the widow of the deceased against the coroner and K. and the hospital authorities to recover damages for the mutilation of the corpse without her consent, *Held*,

- 1st. That since the coroner had authority to order autopsies to be made, and there was no evidence to show that in directing this one to be made he acted maliciously or corruptly, the plaintiff was not entitled to recover against him.
- 2nd. That K. was likewise not liable if he performed the *post-mortem* by order of the coroner, and did so without wantonly mutilating the corpse.
- 3rd. That the hospital authorities having no further connection with the matter than to allow their rooms to be used, they were not liable.
- 4th. That the evidence of an undertaker to show the effect ordinarily produced on a dead body by a *post-mortem* was admissible.

Appeal from the Court of Common Pleas. The instructions given to the jury are set forth in the opinion of the Court. At the trial, the plaintiff offered the following prayers which the Court below (PHELPS, J.), rejected:

Plaintiff's 1st Prayer.—The plaintiff prays the Court to exclude from the consideration of the jury all of the evidence of Dr. Edwin Geer and Dr. N. G. Kierle, in so far as the same tends to show that the said Keirle acted in holding the alleged *post-mortem* examination by order of the said Geer, coroner, and in so far as the testimony of the said Geer tends to show that in ordering the alleged *post-mortem* examination he did so by virtue of his official position as coroner, there being no competent evidence of an inquest held over the body of the deceased.

Plaintiff's 2nd Prayer.—That no legally sufficient evidence has been produced and offered to the jury by the defendants in this case of any proceedings by or before the coroner from which they can infer or find that the body of the plaintiff's husband had been lawfully delivered or turned over to said defendants to be dealt with in the manner testified to by the plaintiff's witnesses in this case.

Plaintiff's 3rd Prayer.—If the jury believe from the evidence that on or about March 16th, 1893, the plaintiff's husband had his right leg crushed off in a railroad accident while coupling cars in Baltimore City, and that thereafter he was taken to the City Hospital for medical treatment, and that he died from the effects of the injury so received in said hospital on the following day, and shall further find from the evidence that his body, after so dying, was removed to the dissecting room of the College of Physicians and Surgeons, one of the defendants, and was there dissected, cut and mutilated by the members or a member of the faculty of the defendant corporation, or any one claiming to act in such capacity with the knowledge and assent of the defendant corporation, then the plaintiff is entitled to recover in this action, unless the jury further find that the defendants had previously obtained the consent of the plaintiff for such purpose, and the jury, in making up their verdict, are at liberty to take into consideration and estimation the mental pain and anguish and lacerated feelings resulted to the plaintiff from the mutilation of the remains of her deceased husband and privation of the body for the purpose of decent interment.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, JJ.

R. B. Tippett and Andrew H. Mettee, for the appellant.

Edwin G. Bactjer (with whom were *Richard M. Venable*, *E. N. Rich* and *William S. Bryan, Jr.*; on the brief; the

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Court declining to hear other counsel than *Mr. Baetjer*), for the appellees.

ROBERTS, J., delivered the opinion of the Court.

The plaintiff below (who is now appellant), brought suit against the College of Physicians and Surgeons of Baltimore City, Dr. Nathaniel G. Keirle and Dr. Edwin Geer. In her declaration she averred that the body of her deceased husband was wrongfully and unlawfully taken in charge by the defendants, and cut and mutilated and used as a subject for the students of the defendant college without warrant in law; and that the defendants wrongfully and unlawfully detained the dead body from burial, when demanded for that purpose by the plaintiff; and that the cutting and mutilation of the body was done secretly and clandestinely, in order to afford instruction to the students of the college, and without the consent of plaintiff or anyone acting for her. The damage alleged to have been caused by these acts was great mental excitement and distress and bodily suffering on the part of the plaintiff. Demurrs by each of the defendants presented to the Court below the question whether the facts alleged entitled the plaintiff to a cause of action. The Court overruled the demurrs, and the case was tried before a jury. The verdict and judgment were in favor of the defendants, and the plaintiff appealed.

Of course, even if errors were committed by the Court in the course of the trial, we could not reverse the judgment, if it were manifest to us that the declaration showed no right of recovery on the part of the plaintiff. We shall not, however, further advert to this matter at present. But inasmuch as the acts laid to the charge of the defendants impute grave moral delinquency, it seems to us just that we should in the first instance carefully examine the grounds on which these accusations are made. The deceased, George W. Young, while engaged in coupling cars on the Northern Central Railroad, sustained a very severe injury; his right leg was mashed below the knee, and the

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injured portion almost severed from his body, retaining ~~its~~ connection with it only by a few threads of tissue. The wounded man was a strong stout man, of good nerve and able to work. His widow testified that he never lost any time from his work; and one of his fellow laborers testified that he had worked with him five years, and that he lost no time. He was sent to the City Hospital in Baltimore, where he died the next day. The College of Physicians and Surgeons supplies the medical and surgical service to the City Hospital, and the patient was under the care of a resident physician, who was appointed by the college. After his death a *post-mortem* examination was ordered by Dr. Geer, one of the defendants, and was conducted by Dr. Keirle, another of the defendants. The *post-mortem* was made in a room belonging to the College of Physicians and Surgeons, where such examinations are usually made; and the two physicians just named are connected with the college; Dr. Keirle being a member of the faculty. The *post-mortem* was without the consent of the plaintiff, the widow of the deceased, or of any member of his family. Evidence was offered on the part of the plaintiff for the purpose of showing that the body was wantonly cut, mutilated and disfigured, and the feelings of the relatives of the deceased inhumanly outraged. On the part of the defendants it was shown that Dr. Geer was one of the coroners of the city of Baltimore, and that Dr. Keirle was the medical examiner appointed by the board of health; also that the *post-mortem* was ordered by Dr. Geer as coroner, and performed in obedience to his orders by Dr. Keirle. Dr. Geer testified that he ordered the autopsy because he wished to know the cause of death; that it had been reported to him that the man's leg had been cut off by the train, and that he had died within thirty-six hours after he was brought to the hospital; and that he did not think that the loss of the leg in this way sufficiently accounted for the death; and that he could not give the death certificate without having a *post-mortem*. Dr. Keirle testified that he did not think that in the majority of cases

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persons in ordinary health, when the leg was crushed below the knee, would die from shock. Dr. Welsh testified that if a healthy man should have his leg crushed off, he would not think it a sufficient cause to explain the death, and in such case, if his official duty required him to give a death certificate, he would make every effort to obtain a *post-mortem*; and that it was so unusual for a death to occur from accident under the conditions surrounding the deceased that other explanations were more probable. Dr. Michael testified that when a man's leg is cut off below the knee, and he dies within thirty-six hours after the injury, the accident would not be an entirely satisfactory explanation of the death, if the man was ordinarily healthy and muscular; and if he was required to determine definitely the cause of death in such a case, he would not consider that he had done his duty without having an autopsy. Dr. Keirle described his proceeding in making the autopsy; the taking out the brain, the opening the body, the removing and cutting into the different organs, the liver, spleen, kidneys, lungs and heart. He testified that you have to examine all the vital organs to see the cause of death, and that the cause of death was persistent heart shock; that the deceased had fatty kidneys, and fatty degeneration of the heart; that the injury itself was not of such a nature as should have caused persistent heart shock, unless there was something else besides the injury which helped to produce it; that the crushing of a man's leg below the knee was not such a thing, in his opinion, as would produce persistent heart shocks. Dr. Welsh and Dr. Michael testify that to make a complete examination it is necessary to remove and open the brain. Without going into minute details, we may say that the professional testimony in this case tends to show that the autopsy was conducted in the usual manner.

By the Act of 1878, chapter 347, the Governor is authorized to appoint four coroners for the city of Baltimore. This Act is codified among the Public Local Laws as Article 4, sections 149, &c. Inquests are required to be held

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whenever a person is found dead and the manner and cause of death shall not be already known as accidental or in the course of nature. There are other duties which coroners in the city of Baltimore are required to perform. The municipality has the power to pass ordinances to preserve the health of the city, and to prevent the introduction of contagious diseases therein. In pursuance of this power a board of health has been established, and many ordinances have been passed for the purpose of detecting and preventing the causes of diseases and removing them when they are found to exist. The board of health is authorized and required to appoint a medical examiner, and it is made his duty to make *post-mortem* examinations in any part of the city when called upon by either of the coroners or the board of health. Baltimore City Code of 1892, Article 23, sections 1, &c.; 6 and 7. Furthermore it is enacted, that "when any person shall die in the said city, it shall be the duty of the physician who attended during his or her last illness, or the coroner when the case comes under his notice, to furnish within forty-eight hours after the death * * a certificate setting forth as far as the same can be ascertained * * the cause, date and place of death." City Code of 1892, Art. 42, section 2. The object of this last provision is obvious. The spread of infectious and contagious diseases is very apt to occur in thickly settled communities. It is therefore the part of wisdom to watch with vigilance every indication of their approach, and to investigate the causes which might in any probability produce them. The causes of death must be ascertained, so that means may be adopted for the prevention of other deaths from the same sources. The evidence before us exhibits the case of a public officer whose duty it is to find out and certify the cause of a death which is brought to his notice. The accident preceding his death, and disabling him, is not in his opinion sufficient to cause the death of a healthy person. There must, therefore, as he thinks, be some diseased condition of the injured man, which con-

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tributed to bring about this result. His opinion is shared by other reputable physicians who have testified in the case. He could not honestly and conscientiously give the certificate which the law required him to give, unless he made proper inquiry into the case. In his judgment and in the judgment of the professional witnesses proper and sufficient inquiry could not be made without an autopsy. So far as the evidence in the case shows, or any rational inference from it, the coroner did simply his plain and positive duty in ordering the autopsy. And the medical examiner, Dr. Keirle, was equally obliged by his duty to obey the order of the coroner. On the prayer of the defendants the Court gave to the jury the three following instructions:

1. There is no evidence in this case to show that the College of Physicians and Surgeons did any of the alleged wrongful acts mentioned in the declaration or ratified the same, and therefore their verdict must be for the said defendant, the College of Physicians and Surgeons of Baltimore City.
2. That there is no evidence legally sufficient to show that the defendant, Geer, participated in any way in the commission of the alleged wrongful acts mentioned in the declaration, further than as coroner of the State of Maryland, to order the *post-mortem* examination to be performed, and that there is no evidence legally sufficient to show that in ordering the *post-mortem* examination to be performed, he acted wantonly, maliciously or corruptly, and therefore the verdict must be for this said defendant, Edwin Geer.
3. If the jury believed that the defendant, Keirle, performed the *post-mortem* upon the body of George W. Young, deceased, at the order of Coroner Geer, as the city examining physician, and that in performing said *post-mortem* he treated the body with ordinary decency and did not wantonly disfigure the same, he acted within the scope of his official duty and the verdict must be for the defendant, Keirle.

The College of Physicians and Surgeons permitted their

room to be used for the *post-mortem* examination, but appears to have had no further connection with the matter. The *post-mortem* was a lawful proceeding. If anything irregular or improper occurred in the prosecution of it, the College took no part in it. The same thing may be said in reference to the coroner. The question regarding the charges which alleged the wanton mutilation of the body was fairly left to the jury in the last instruction. The prayers offered on the part of the plaintiff were inconsistent with those granted by the Court, and were properly rejected. As the jury have acquitted the defendants of the charges made against them, it would seem to be rather an abstract question to consider what would have been their responsibility in a civil action if they had been found guilty. It is to be hoped that few persons in a civilized country would wantonly mutilate a dead body, or would without warrant of law attempt to prevent surviving friends and relatives from performing the rites of Christian sepulture. Such acts would manifest a great depth of depravity.

Two exceptions were taken to the admission of testimony given by Mitchell, a funeral director. He was asked, "Did you ever have, in your professional capacity, anything to do with the preparing for burial persons upon whom *post-mortem* examinations had been made?" to which he replied, that he had. He was then asked, "When the body is turned over to the funeral director for burial, is it or is it not, after a *post-mortem* has been performed on it, fit to be seen by the family without shocking their sensibility?" to which he replied, "I never received a body from the hands of the coroner or where a *post-mortem* examination had been made, that was in a condition for the family to see without being prepared." The testimony showed the effect produced on a dead body by a *post-mortem* examination. We cannot see any objection to proving this fact; it might almost be inferred from common knowledge that the use of the surgeon's knife would disfigure the human body and give it an

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appearance which would shock the sensibilities of the family of the deceased. The judgment must be affirmed.

Judgment affirmed.

(Decided June 18th, 1895.)

THOMAS C. ROWE *vs.* EZRA NALLY.

Easements and Servitudes—Sufficiency of Declaration.

A declaration set forth that the defendant was the owner of a narrow strip of land extending from his property to a public road, the same being used by him as a way; that plaintiff owned the land on both sides of said strip, and was entitled to have a gate maintained by the defendant at the public road where defendant's strip of land ended; but that the defendant removed the gate therefrom. *Held*, upon demurrer, that the declaration did not set forth a good cause of action, there being no allegation of any contract or deed by which defendant was bound either himself to maintain a gate at that point, or to allow the plaintiff to maintain one on defendant's land; and there being no allegation of a prescriptive right.

The owner of a tract of land may convey a portion of it, and in the deed may retain an easement therein, for the benefit of the undisposed of part; or he may convey to his grantees an easement in the land which he retains. But these easements do not compel the owner of the land subject to them to perform work or service. It is the nature of a servitude not to constrain the owner of the servient tenement to do anything, but to restrain him from doing, or to compel him to suffer something to be done upon his property.

Appeal from the Circuit Court for Washington County.
The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, ROBERTS and BOYD, JJ.

Norman B. Scott, Jr., and *Charles D. Wagaman* (with whom was *Alexander Armstrong* on the brief), for the appellant.

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J. Clarence Lane (with whom was *J. M. Keedy* on the brief), for the appellee.

BRYAN, J., delivered the opinion of the Court.

The question in this case is presented by a demurrer which was filed to a declaration in the Court below. The demurrer was sustained, and the plaintiff has appealed to this Court.

The declaration originally contained three counts; but the first one having been abandoned, the case rests entirely on the other two. It will be necessary to examine the pleadings carefully. In the second count it is averred in substance that the defendant was the owner and possessor of a tract of land in Washington County, and that he also owned and possessed a strip of land, one perch in width, which extended southwardly from this tract to a public road; and that this strip was used by him as a roadway to said public road. It was also averred that the plaintiff owned and possessed land lying and bounding on each side of this strip, and that by reason of said ownership and possession and for the protection of his land, he was entitled to have a gate maintained at the public road at the terminus of the strip. It was further averred that the defendant, disregarding his rights in the premises at divers dates and times, demolished and removed the gate. The statement of the alleged right of the plaintiff is somewhat vague and obscure. It may mean a right to have the gate maintained by the defendant, or it may mean that the plaintiff has a right to maintain it for himself at his own expense. We shall consider the question in both aspects. The declaration does not state that the defendant made a contract with the plaintiff that he would maintain the gate on his own land, or permit it to be maintained by the plaintiff. But it sets up a claim to this privilege by reason of the possession and ownership of contiguous land. It is sought for this reason to impose a burden on the defendant's land; this bare, naked, unqualified ownership and possession is the title which is alleged to confer a right in and control over adjoin-

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ing land. In the classification of the objects of property an interest of this kind is called an easement or a servitude; in the present case it would be an easement appurtenant to the plaintiff's land. In *Baltimore, &c., Railroad v. Algire*, 63 Md. 323, it was said that as a general rule an interest or easement in land must be acquired in the mode provided for the transfer of real estate. And in the common law treatises it is said that it cannot be acquired, except by grant or prescription, which pre-supposes a grant. *Gale on Easements*, m. p. 18 and 86; *Washburn on Easement, &c.*, m. p. 18. There are two very usual methods of creating an easement or imposing a servitude on land. The owner of a tract of land may convey a portion of it, and in the deed of conveyance may retain an easement in it for the benefit of the portion which he does not dispose of; or he may in the deed convey to his grantees an easement in the land which he retains in his possession. These easements are appurtenant to the land, and pass with it to successive grantees. But they do not compel the owner of the land subject to them to perform work or service; such, for instance, as to maintain a gate. On this point the authorities are decided. We will quote a passage from *Washburn* (m. p. 4 and 5): "It is the nature of servitudes not to constrain any one to do, but to suffer something, *ut aliquid patiatur aut non faciat*." "Hence," says Mr. Erskine, "it may be perceived that he whose tenement may be subject to a servitude, is not, in the common case, bound to perform any act for the benefit of the person or tenement to which it is due. His whole burden consists either in being restrained from doing or in being obliged to suffer something to be done upon his property by another. In the first case, in which the proprietor is barely restrained from acting, the servitude is called negative, in the last positive." And we must bear in mind that although a covenant imposes merely a personal obligation on the covenantor, yet an instrument having the form of a covenant may in legal effect be a grant, if its terms evince that such is the intention of the

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parties. Let us make an extract from *Gale on Easements*, m. p. 47: "The better opinion being, that the burden of covenants does not run with the land so as to bind an assignee, except in cases between landlord and tenant, it becomes important to determine in each case whether the terms of the covenant are such as to create a grant of an easement, in which case the effect of them is to create an incorporeal hereditament, giving the successive owners of it a right as against all the succeeding owners of the land affected by it, without regard to any question as to burden of covenants running with land." It would be unprofitable to consider in detail other modes by which an easement may be created and acquired. In all cases it must be derived from some one who has an estate in the land commensurate with the burden imposed. We see nothing in the second count which shows a title to the easement claimed. There is no allusion to a grant, express or implied, and no averment of adverse and continuous user for the period of prescription, nor is any other fact averred which in any way tends to show a prescriptive right.

The third count is similar to the second in the nature and character of the facts from which the easement is alleged to arise. The averments are slightly varied, but not in any material respect. After stating the ownership and possession of the strip of land by the defendant, and the use of it as a road from his other land to the public road, it stated that it was "*used also by the plaintiff at the terminus of said highway to reach the lands of the plaintiff lying adjacent to said road or way as aforesaid, and the said road or way for the protection of the lands of the plaintiff and for the purpose of the user aforesaid,*" and by reason of his ownership and possession of his lands was enclosed from the public road by a gate; and that the plaintiff was entitled to have the gate maintained at the terminus of the strip of land at the public road; and that the defendant damaged, removed and tore it down. We think that what we have said in ex-

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amining the second count, is sufficient to show our opinion on the sufficiency of the third. The judgment must be affirmed.

Judgment affirmed.

(Decided June 18th, 1895.)

THE BALTIMORE AND OHIO RAILROAD COMPANY vs. STATE, *use* OF MARY J. CHAMBERS AND IRVING CHAMBERS, BY NEXT FRIEND.

Negligence—Passenger Crossing Track at Railroad Station—Running Train Through Station—Who are Passengers—Res Gestae—Rules of the Company—Intoxication of Deceased—Evidence—Right of Wife Separated from Husband to Recover Damages.

A judgment will not be reversed on account of the refusal of the trial Court to strike out testimony improperly admitted, when the same facts have been proved by competent evidence.

Declarations of a party, made just before he boarded the defendant's train, and the occurrence of the accident by which he was killed, touching his purpose in going on the train, are admissible as part of the *res gestae*.

In order to become a passenger and entitled to protection as such at the hands of the carrier, it is not necessary that a person shall have paid his fare or entered a train, but he is such as soon as he comes within the control of the carrier at the station, through the usual approaches, with intent to become a passenger by paying fare, either before or after entering the train.

Intoxication on the part of the injured person is not proof of negligence *per se*.

The fact that a man killed by the negligence of the defendant had been separated from his family for twelve years preceding his death and had contributed nothing to the support of the plaintiffs, does not prevent a recovery by them; the marital relation and the rights and duties growing thereout continued to exist.

There were two stations of the defendant company in the town of B., known as the West and East station. The deceased, after declaring to friends his intention to go to Washington, boarded, at midday, a

local train of the defendant, by jumping on the platform of a car next to the tender of the engine, at the West station and was carried half a mile to the East station, whence a train started for Washington. Upon arriving there he went on a platform across the tracks towards the ticket office, and while so attempting to cross, a passenger train passing through the station at a rate of speed variously estimated as from 17 to 35 miles an hour, struck and killed the deceased. Other passengers were crossing the track at the same time, and the deceased did not look out for approaching trains before attempting to cross. There was conflict of evidence as to whether a bell was rung and whistle blown by the train that struck the deceased. There was testimony showing that the deceased was somewhat under the influence of liquor at the time he boarded the train at the West station. In an action by the widow and infant child to recover damages, *Held*,

- 1st. That it was immaterial how the deceased got from the West station to the East station, if when at the latter station he was rightfully on defendant's premises and traversed the way usually taken by passengers to the ticket office.
- 2nd. That there was evidence from which the jury could find that when he crossed the tracks he was in quest of a ticket to Washington, and under the circumstances of the case he was not bound to stop, look and listen before crossing.
- 3rd. That an instruction to the jury that if the deceased was slightly intoxicated when he got aboard the first train, but was not drunk at the time of the accident, then the jury cannot infer that he was guilty of want of ordinary care is correct.
- 4th. That it was negligence on the part of the defendant to run a train through the station at a high rate of speed while another train was standing there discharging passengers, under the circumstances of this case.
- 5th. That a rule of the defendant company to the effect that "when one passenger train is standing at a station receiving or discharging passengers on double track, no other train will attempt to run past until the passenger train at the station has moved on, or signal given by the conductor of the standing train," is admissible in evidence.
- 6th. That the time tables of the defendant company were also admissible in evidence.
- 7th. That testimony as to whether the deceased saved anything out of his earnings is not admissible.

Appeal from the Circuit Court for Frederick County. This action was brought in the name of the State to recover damages for the killing of John W. Chambers at the East Brunswick station of defendant's road, on April 21, 1894.

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through the alleged negligence of defendant's servants' The evidence showed that Chambers, being near the West Brunswick station, and desiring to go to Washington, enquired when the next train would leave by which he could go. At that moment a train, which connected for Washington, was about leaving the West station, and would pass by where Chambers stood. As it approached he got aboard the first platform of the baggage car and rode thereon to the East station, a distance of half a mile. When the train stopped he got off on a long platform between the tracks, and started across the north track by a connecting platform over that track, going toward the ticket office. Other passengers were crossing over at the same time; also several of defendant's employees. There is a double track in front of this station used by passenger trains, and it was as Chambers was about to cross the intervening track between the station and the train from which he had alighted—No. 16—that train No. 5, an express train, running westerly in the opposite direction, came by and struck and killed him. There was conflict of testimony as to the speed of the express train at the time—plaintiffs' witnesses putting it at from 30 to 35 miles an hour, and defendant's witnesses at from 15 to 17 miles an hour. There was also some conflict as to the ringing of the bell and blowing of the whistle of No. 5; some of the plaintiffs' witnesses testify that they did not hear either, and that their attention was first called to the approaching train by some one exclaiming, "Here comes No. 5!" while the testimony of the appellant's witnesses is very positive that the whistle was blown and the bell rung.

At the trial the plaintiff offered the following prayers:

Plaintiffs' 1st Prayer.—If the jury find that John W. Chambers on &c., got aboard the train called accommodation train, known as No. 16, over defendant's road, in the manner testified to by William C. Compton, and rode thereon to the East Brunswick station, a distance of about one-half mile, on the platform of the baggage car, if they shall so find, and that said train, then on the south track of defend-

ant's road, stopped at said station for the purpose of receiving and discharging passengers, and that when said train reached said East Brunswick station, John W. Chambers left his position on the accommodation train to obtain a ticket to Washington by said train, and that he got off on the side next to the station, upon a long platform between the north and south tracks of said road, as shown in the photograph in evidence, and that he walked towards the ticket office at said station, to reach which it was necessary for him to cross the north track of defendant's road, and that in so walking on the platform and in attempting to cross said north track to get to said ticket office, if the jury so find, he was killed by the locomotive of an express train of defendant while operated by its agents over its roads, and that the equitable plaintiffs are related to him in the manner set forth in the pleadings herein, and that said killing resulted directly from the want of the exercise of ordinary care and prudence on the part of the agents of defendant, and not from the want of ordinary care and prudence of deceased, directly contributing to the accident, then the plaintiffs are entitled to a verdict. (Granted.)

Plaintiffs' 4th Prayer.—If the jury find from the evidence that John W. Chambers, on or about April 21st, 1894, got aboard the train called the accommodation train, known as No. 16, over defendant's road, in the manner testified to by the witness, William C. Compton, and rode therein to the East Brunswick station, a distance of about one-half mile, on the platform of the baggage car, if the jury shall so find, and that said train then on the south track of defendant's road stopped at said station for the purpose of receiving and discharging passengers at that station, and when said train reached said East Brunswick station, John W. Chambers left his position on the accommodation train to obtain a ticket to Washington by said train, and that he got off on the side next to the station on a long platform between the north and south tracks of said road, as shown in the photograph in evidence, and that he walked toward the ticket

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office at said station, to reach which it was necessary for him to cross the north track of defendant's road, and that in so attempting to cross over said north track to get to said ticket office he was killed by the locomotive of an express train of defendant, while operated by its agents over its road, and that the equitable plaintiffs are related to him in the manner set forth in the pleadings herein, that then the verdict of the jury must be for the plaintiffs, unless the jury shall find that said John W. Chambers actually saw said train No. 5 approaching, or heard the cries warning him of its approach, and understood the same in sufficient time to avoid being struck by the engine of said express train, if the jury shall find that he was so struck, and in this connection the jury are to consider the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger. (Granted.)

Plaintiffs' 5th Prayer.—That if the jury shall find from the evidence that John W. Chambers had used intoxicating drink on the morning of April 21st, 1894, as testified to by the witness, William C. Compton, and that he was slightly intoxicated when he got aboard of train No. 16, as testified to by defendant's witness, L. V. Dean, but if they shall further find that deceased was not drunk when he was about to cross the defendant's track at East Brunswick, as mentioned in the 1st prayer of plaintiffs, such use of intoxicating drink and such slight intoxication is not evidence from which a jury may infer the want of ordinary care and prudence on his part. (Granted.)

Plaintiffs' 6th Prayer.—That if the jury shall find for the plaintiffs, then, in assessing the damages, they are to estimate the reasonable probability of the life of the deceased, Chambers, and give his widow and child, Irving C. Chambers, of the equitable plaintiffs, such pecuniary damages, not only for past losses, but for such prospective damages as the jury may find that they have suffered or will suffer as a direct consequence of the death of said Chambers. (Granted.)

Plaintiffs' 7th Prayer.—That if the jury shall believe from all the evidence that the defendant company erected and maintained at East Brunswick the platform shown in the photograph offered in evidence and the same, and walking across the north track of defendant were the only passageways provided for persons who had to go to and from said station and ticket office and said large platform between the tracks; and shall further find that defendant was in the habit of stopping its eastbound passenger accommodation train on its south track at said platform between the tracks, to allow passengers to embark and disembark at East Brunswick, by passing over said north track and said connecting small platform; and shall further find that deceased, Chambers, arrived at said platform, between the tracks, on train No. 16 of defendant; that said train stopped; that deceased thereupon got upon said platform between the tracks and started to go across said north track to defendant's ticket office to buy a ticket to Washington City by said train; that just as deceased stepped on said north track he was struck by an engine of defendant, drawing its train No. 5, over said north track, and killed while said train No. 16 was still standing at said station, embarking and disembarking passengers; if the jury shall so find, and shall believe that the equitable plaintiffs, Mary J. Chambers and Irving C. Chambers, were related to decedent, as mentioned in evidence, that then the verdict of the jury must be for the plaintiffs, unless the jury shall find that decedent actually saw said train No. 5 approaching, or heard cries warning him of its approach and understood the same in sufficient time to avoid being struck by the engine of No. 5; if the jury shall find he was so struck, and in this connection the jury are at liberty to consider the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger. (Granted.)

Plaintiffs' 8th Prayer.—That if the jury shall believe from the evidence that the defendant company erected and maintained, at East Brunswick station, the platform shown in photo-

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tograph offered in evidence, and that the same and walking across the north track of defendant were the only passage ways provided for persons who had to go to and from said station house and ticket office platform and said large platform between the tracks on business with said defendant company, and shall further find that defendant was in the habit of stopping its eastbound accommodation passenger trains at said platform, between the tracks, to allow passengers to embark and disembark by passing over said north track and said connecting platform, that then said deceased, Chambers, had a right to consider that any person needing to pass to and from said station and ticket office platform and said platform between the tracks upon business with defendant were invited to use said platforms and passage ways, and that said passage ways and platforms would be kept free from danger of trains passing over its north track while a passenger train was standing on its south track embarking and discharging passengers. (Granted.)

Plaintiffs' 9th Prayer.—That under all the circumstances mentioned in evidence, it was gross negligence of the defendant to run its train No. 5 over the north track of its road while its accommodation train No. 16 was standing at East Brunswick station embarking and discharging passengers; if the jury shall find that train No. 5 was so run, and that negligence is not properly imputable to the deceased for failing to look out for the danger of said train No. 5 passing at said point, since deceased had the right to consider that said train could not be so run while said train No. 16 was standing at said platform receiving and discharging passengers. (Granted.)

Plaintiffs' 10th Prayer.—That if the jury shall find the facts set out in the 1st prayer that it is entirely immaterial whether decedent got upon defendant's train No. 16 while in motion, or where he placed himself on same, or whether he was or not known by defendant's employees in charge of No. 16 to be on said train at and prior to its arrival at East Brunswick. (Granted.)

And the defendant, by its counsel, offered the following prayers:

Defendant's 1st Prayer.—That from the undisputed facts in this case, the said John W. Chambers, at the time that he was struck and injured by the defendant's train, and from which injury he subsequently died, was not a passenger of the defendant company; that no contractual relation at said time existed between the said John W. Chambers and the defendant; and that the said John W. Chambers, not being a passenger, as aforesaid, was not entitled to that degree of care on the part of the defendant imposed by law upon it as a carrier of passengers; and if the jury shall find that the said Chambers started to cross the north track of defendant's road without looking down the track in an easterly direction, from which direction train No. 5 was approaching; and shall further believe from the evidence, that the view of the track in said easterly direction was unobstructed for about half a mile (as testified to by the witnesses;) and that if the said Chambers had looked he could have seen said train approaching in time to avoid injury; and that in walking on said north track or in attempting to cross the same in front of said approaching train, the said Chambers was struck by the engine of said train and severely injured, and from which injury he shortly afterwards died, then that the said Chambers was guilty of contributory negligence, which negligence was the direct cause of the injury complained of, and the plaintiffs are not entitled to recover damages in this action, and the verdict of the jury must be for the defendant; unless the jury shall further find, that the defendant, after discovering the said Chambers in a dangerous position, could have, by the use of ordinary care and diligence, avoided said accident, of which there is no evidence. (Rejected.)

Defendant's 2nd Prayer.—That if the jury shall believe from the evidence that the said John W. Chambers got upon the defendant's train, No. 16, between the tender of the engine and the baggage car of said train, at a point east

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of the defendant's old station at Brunswick, while said train was in motion, without procuring a ticket, and without the knowledge or consent of the agents of the defendant in charge of said train, and in this position rode to the defendant's station at East Brunswick, and that upon the arrival there of said train No. 16, or shortly afterwards, the said Chambers got down off the platform of the car upon which he had been riding (next to the tender of the engine), upon the station platform at East Brunswick, and started across the north track of the defendant's road at that point without looking down the track in an easterly direction, from which direction the express train No. 5 was approaching ; and shall further believe from the evidence, that the view in said easterly direction was unobstructed for the distance of about half a mile (as testified to by the witnesses;) and that if the said Chambers had looked he could have seen said train approaching in time to avoid injury; and that in attempting to cross the north track in front of said approaching train, the said John W. Chambers was struck by said train and severely injured, and from which injury he shortly afterwards died, then that the said Chambers was guilty of contributory negligence, which negligence was the direct cause of the injury complained of, and the plaintiffs are not entitled to recover damages in this action, and the verdict of the jury must be for the defendant, unless the jury shall further find that the defendant, after discovering the said Chambers in a dangerous position, could have, by the use of ordinary care and diligence, avoided said accident, of which there is no evidence. (Rejected.)

Defendant's 6th Prayer.—That if from the evidence the jury believe that the deceased had been separated from his family for a period of about twelve years immediately preceding his death, and that he had contributed nothing to the support of his wife or infant child during that period (as testified to by the witnesses), that then there is no evidence in this cause legally sufficient to entitle said equitable plaintiffs to more than nominal damages. (Rejected.)

Defendant's 8th Prayer.—That the jury cannot impute negligence to the defendant company, from the fact that the passenger train No. 16, the train going East, and upon which the said Chambers had been riding, was behind the schedule time, and late in arriving at the East Brunswick station, if the jury shall so find. (Granted.)

Defendant's 9th Prayer.—That if from the evidence the jury believe that the said decedent, John W. Chambers, had been separated from his wife for a period of about twelve years, immediately preceding his death, and that during that time he had contributed nothing to her support, as testified to by the witnesses, that then there is no evidence in this cause legally sufficient to entitle the equitable plaintiff, Mary J. Chambers, wife of said decedent, to more than nominal damages. (Rejected.)

Defendant's 10th Prayer.—The defendant, by its counsel, prays the Court, under all the pleadings and evidence, to instruct the jury that there is no sufficient legal evidence in this case from which the jury can find for the equitable plaintiffs in this cause, and the verdict of the jury must be for the defendant. (Rejected.)

Defendant's 12th Prayer.—That every person of ordinary intelligence is bound to know that a railroad track is a place of more than ordinary danger, and it becomes his legal duty, when being on or about a railroad track, to use corresponding care and caution to avoid injury, and if the jury believe from all the evidence in this case that the plaintiffs' decedent, Jno. W. Chambers, at the time he went to or upon the defendant's track and received the injury which caused his death, did not look or listen for approaching trains, and that if he had so looked or listened he could have seen or heard the approaching train which struck and injured him, and avoided the same, that then said Chambers was guilty of negligence in not so looking or listening for approaching trains, and directly contributed to the injury which caused his death, and the equitable plaintiffs are not entitled to recover in this case, unless the jury shall further find from

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the evidence that the defendant's agents, after said Chambers got in a place of danger, could have prevented such injury and did not do so. (Rejected.)

The Court below (LYNCH, J.), granted the plaintiffs' 1st, 4th, 5th, 6th, 7th, 8th, 9th and 10th prayers, and rejected the defendant's 1st, 2nd, 6th, 9th, 10th and 12th prayers. The defendant excepted to the action of the Court, and especially to the granting of the 1st, 3rd, 4th, 5th, and 7th prayers of the plaintiffs, upon the ground of the insufficiency of the evidence to sustain them.

The jury returned a verdict for the plaintiffs, assessing their damages at \$2,500, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

W. Irvine Cross and Geo. Dobbin Penniman (with whom were *John K. Cowen* and *John S. Newman* on the brief), for the appellant.

William P. Maulsby, Jr., and *Glenn H. Worthington*, for the appellees.

ROBERTS, J., delivered the opinion of the Court.

This action was brought in the Circuit Court for Frederick County, in the name of the State, as plaintiff, for the use of the widow and children of John W. Chambers, who was killed by what is alleged to have been the wrongful act, neglect or default of the defendant corporation. There was a verdict for the plaintiff and judgment thereon, from which the defendant has appealed. The accident happened at a station on the main line of the defendant's road in Frederick County, known as East Brunswick. There are in the town of Brunswick two stations on said road; one is known as East Brunswick, and the other as West Brunswick. At about the hour of noon, on the 21st day of April, 1894, the deceased, John W. Chambers, being at the

West Brunswick station, remarked, that having been disappointed in seeing a party, he would go to Washington, D. C., and shortly thereafter boarded a local passenger train, No. 16, which carried him to the East Brunswick station, where he could obtain a ticket to Washington on an express train. As train No. 16 reached the West station, he jumped on it between the tender of the engine and the first car. It is contended that he was, at the time he got on the train, somewhat under the influence of drink. He rode to the East station on the platform of the postal car, which was coupled to the tender of the engine. When he reached the East station he got off on a platform between the railroad tracks, and started in the direction of the depot. Other passengers were crossing at the same time, as well as some of the employees of the defendant. There is a double track in front of the station used by passenger trains, and as the deceased was about to cross the intervening track between the station and the train from which he had alighted, an express train running westerly came by and struck and killed him. There is conflict of testimony, both as to the speed at which the train was running, and as to ringing of the bell and the blowing of the whistle.

The first exception found in the record of this appeal arises upon the refusal of the Court below to strike out the testimony of Mrs. Chambers, the widow, as to the earnings of her husband; she having testified that she had not seen or held any communication with him, for a period of from two to three years prior to his death. We do not think, however, that the admission of this testimony furnishes any ground for reversal, as the objection to it was not timely, and the testimony of Lizzie Sykes and of S. B. Barr, both of whom testified to the same effect, was admitted without objection. *Hayes v. Wells*, 34 Md. 512; *Leffler v. Allard*, 18 Md. 545; *Colc v. Harrington*, 7 H. & J. 146. The second and third exceptions relate to conversations which took place between the decedent and certain witnesses, in which he expressed his intention of going to Washington. Such

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declaration of the decedent made at the very moment of time immediately preceding the act of the defendant company, by which he lost his life, form part of the *res gestae*, and were properly admissible. In support of this view, Mr. Greenleaf, in his work on *Evidence*, vol. 1, § 108, pointedly observes, that "the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the Judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

The plaintiff was entitled to this testimony, as having an important bearing upon the right of the decedent to be upon the defendant's property, and pass over a customary way to the ticket office of the defendant, for the purpose of purchasing a ticket over its road to Washington. In this view, it becomes very immaterial how the decedent got from West Brunswick station to East Brunswick station, if when he got there he was rightfully on defendant's premises, and took the same course and traversed the same path usually taken by passengers and employees of the defendant from where No. 16 delivered its passengers to the ticket office, where passengers obtained their tickets for passage on the express train of the company to the city of Washington. The chief question in this case, as stated in the appellant's brief, is, "was Chambers, at the time of his death, a passenger of the appellant and thereby entitled to all the safeguards the law throws around one in that position; or, on

the other hand, was he a trespasser, or at most a licensee, to whom the appellant owed much less care and protection." It is conceded to be the well-settled rule that a person is a passenger who enters upon depot grounds by the approaches furnished by the carrier. The fare does not have to be paid, nor the train entered, but the person must merely enter within the control of the carrier at the depot through the usual channels of business with the intention of becoming a passenger, by either paying fare before or after entering the train. We have already adverted to this phase of the case and will have occasion to make more particular reference to it, when we come to the consideration of the prayers. The fourth exception is taken to the ruling of the Court below in permitting the time-table of the defendant in force on April 21st, 1894, the day of the accident, to be offered in evidence. We fail to recognize the force of this objection, or to perceive wherein the defendant is injured by its admission. The other proof in the record on this subject is doubtless conflicting, but its effect is directly in the same line and not materially variant therefrom. As part of the same exception, is the objection to the admissibility of Rule No. 441 of the company, in force at the time of the accident. There is nothing in the record to show that this was a private rule for the guidance of the employees of the appellant, and not intended for the eye of the public, and no reason has been assigned why the rule should not have been open to public inspection, as it was a prudent and justly precautionary measure, beneficial alike to all parties concerned. If it be true that the rule was only intended for the servants of the company, it was not on this occasion observed by them, but if it had been a rule of the company previously complied with, it was notice from which the public had a right to infer a continuance of the custom. Yet without any rule upon the subject, it was negligence on the part of the company to run its train at a high rate of speed through a station where another train was discharging passengers. It was unquestionably the right, and we

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think clearly the duty of the appellant to have made proper regulations for the safe conduct of its business in the protection of the lives of its passengers, and the preservation of property entrusted to it for transportation. The rule referred to is as follows: "441. When one passenger train is standing at a station receiving or discharging passengers on double track, no other train (whether passenger or freight), will attempt to run past until the passenger train at the station has moved on, or signal is given by the conductor of the standing train for them to come ahead."

We think the plaintiff was entitled to the benefit of the rule in evidence before the jury. Doubtless no such rule would have been adopted by the defendant, even for its own protection, if experience had not demonstrated its absolute necessity. If the rule was only intended for the protection of the property of the defendant, it seems to us to be a most salutary precaution to have been followed for the preservation of the lives of the passengers of the defendant, or of those seeking to become passengers. This Court said, in *Hauer's case*, 60 Md. 449, that, "passengers are justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road would be free from interruption or obstruction when trains stop at a depot or station to receive or discharge passengers." It thus significantly appears that the doctrine just announced and Rule 441 are closely analogous.

The fifth exception is taken to the refusal of the Court below upon the objection of the plaintiff to permit inquiry to be made as to whether or not the decedent saved anything out of his earnings. The question was properly excluded, and we think, wholly irrelevant. At the conclusion of the plaintiff's case, the defendant offered five prayers, all of which the Court rejected. It will not be necessary for us at this time to give attention to the propositions of law contained in these prayers, as the same questions are again presented at the conclusion of the case, and will then receive consideration. The Court granted the plaintiff's

first, fourth, fifth, sixth, seventh, eighth, ninth and tenth prayers, and rejected the first, second, sixth, ninth, tenth and twelfth prayers of the defendant. Special exceptions were filed by defendant to first, fourth, fifth, seventh and eighth prayers of the plaintiff, on the ground that they assume as a fact proven that said decedent was about to cross the north track of defendant's road to go to the ticket office of the defendant at East Brunswick station for the purpose or with the intention of procuring a ticket to Washington, that he had business which took him to the ticket office.

To the granting of the said prayers of the plaintiff and the rejection of said prayers of the defendant, the defendant objected. We will first consider the plaintiff's exceptions to first, fourth, fifth and seventh prayers, which have been specially excepted to on the ground just stated. In considering these prayers and the exceptions to them as being without evidence to support them, the relation which decedent held to the defendant at the time of his death, and immediately prior thereto, comes prominently into view. In passing upon the second and third exceptions we had occasion to examine the relevancy of certain conversation offered to show the decedent's intention when he left West Brunswick to go on the train No. 16 to East Brunswick. It is not necessary to a proper determination of the mutual rights of the parties to this record, that we should be governed by the technical definitions of who are passengers and who are not. The question must be decided upon a just ascertainment of all the circumstances surrounding the occurrence. It is not exclusively passengers who have rights against railroad companies when upon their property. But each case must be dealt with as the evidential facts and circumstances determine its character. Now, in this case we think the jury was justified in finding from the evidence that Chambers left West Brunswick station on the day of his death, with the intention of taking an express train at East Brunswick station for Washington. It is wholly im-

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material how he got from the one station to the other. There is evidence in the cause from which the jury were at liberty to infer, that when he crossed the railroad track from No. 16 train to the station, he was in quest of a ticket to Washington. He took the same route to the ticket office as that pursued by other passengers and certain employees of the appellant. He was not required under the circumstances of this case, when he reached the track, "to stop, look and listen." This rule is not one of universal application, except in cases when it is applied to public road crossings. It was impossible for passengers or other persons to reach the station from where No. 16 train stopped without walking across the north track. This Chambers sought to do, and lost his life in the effort. He was a book agent much accustomed to railroad travel, and therefore familiar with the risks and dangers incident to such travel; and it is not a reasonable inference to be drawn from the usual conduct of men, that if he had noticed the approach of No. 5 train, he would have deliberately walked to his own destruction. The company, so far as the record discloses, had provided no way of approach or crossing to the ticket office, from where No. 16 accommodation train was discharging its passengers, except across the north track. We think, as hereinbefore indicated in discussing the exceptions to the testimony, that there is evidence in the record from which the jury were at liberty to find, "that the decedent was about to cross the north track for the purpose of procuring a ticket to Washington." His language and his conduct both contribute to the assertion of his purpose and intent. This was the only material question requiring consideration in the plaintiffs' first, fourth, seventh and eighth prayers.

The plaintiffs' fifth prayer is objected to as being misleading. It instructs the jury that if they find from the evidence that Chambers had on the morning of April 21st, 1894, used intoxicating drink, and was slightly intoxicated when he got aboard train No. 16 at West Brunswick, but that he was not drunk at the time of the accident, then such

use of intoxicating drink and such intoxication are not evidence from which the jury may infer want of ordinary care and prudence. This question has frequently been before the Courts, and views somewhat in conflict are the result. It has been repeatedly held that intoxication of the injured party does not constitute negligence *per se* on his part. *Holmes, adm., v. Oregon, &c., R. R. Co.*, 5 Fed. Rep. 523; *Alger v. Lowell*, 3 Allen, 402. And in the case of the *B. & O. R. R. Co., v. Boteler*, 38 Md. 568, this Court held that intoxication on the part of the plaintiff at the time of the accident did not constitute negligence in law warranting a non-suit or a peremptory instruction for the defendant. We think the Court committed no error in granting this instruction. It might have gone farther and submitted the circumstances of the plaintiffs' drinking, and the degree of his intoxication, which the jury would have a right to consider upon the question of due care to be exercised by the decedent, but the prayer is not defective because of this omission. The defendant had the right to such an instruction, but it has no right to complain because it did not request it. The legal proposition which the prayer embodies is undoubtedly correct.

It necessarily follows from what we have already said respecting the right of Chambers to cross from train No. 16 to the ticket office and station at East Brunswick, that we affirm the ruling of the Court on the ninth prayer of the plaintiff. In granting the plaintiffs' first, fourth, fifth, sixth, seventh, eighth, ninth and tenth prayers, and the defendant's third, fourth, fifth, seventh, eighth and eleventh prayers, the law of the case has been correctly given to the jury for their guidance. From the views which we have expressed concerning the prayers of the appellee, little more need be said of the propositions of law submitted by the appellant. Nothing was said in the argument before this Court as to the demurrer to the declaration, and we have treated it as having been abandoned. But the appellant's sixth prayer contained a proposition which we think is not sustained,

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either by reason or authority. It asks the Court for instruction, that if they find that the decedent had been separated from his family for a period of about twelve years immediately preceding his death, and that he had contributed nothing to the support of his wife or infant child during that period, that then the plaintiff was only entitled to nominal damages. In this we do not concur. The marital relation still continued to exist between the parties at the time of the death of the husband, and whilst they had not, for the period stated, lived together as man and wife, her legal rights had suffered no change or impairment. It is very clear from the testimony in the record, that the wife had not, by her own wrong, forfeited her right to a decent support from her husband in accordance with her station in life. The marital relation created this right, and it continued to exist in law to the death of the husband, and this, too, without reference to the will or wishes of the husband. When this prayer is viewed in connection with the appellant's fifth prayer, which was granted, and which allowed the jury, in estimating damages, to take into consideration all of the facts stated in the sixth prayer, we fail to find any error in its rejection. From a careful consideration of the whole case, we find no error in the rulings of the Circuit Court upon the testimony or the prayers, and therefore affirm its rulings.

Judgment affirmed with costs.

(Decided June 18th, 1895.)

JOHN J. HOFFMAN *vs.* CHARLES C. McCOLGAN.

Mechanics' Lien—Estate of Lessor not Liable for Improvements made by Lessee.

Where the contract for materials to be used in the construction of houses was made with the lessee of the land, the estate of the lessor is not subject to a mechanics' lien therefor.

Defendant, the owner of a number of lots of unimproved ground, leased the same to C. for 99 years, reserving a rent of six dollars per front foot. On the same day, the defendant and C. made a contract by which C. agreed to erect houses on the lots and the defendant agreed to pay to C. the sum of \$500 on each house as a bonus, and also to lend to C., or procure to be loaned, the sum of \$700 on each house. C. then procured bricks for the structure on credit from the plaintiff, telling him that payment would be made with money to be advanced by the defendant. Before completion of the houses C. became insolvent, and abandoned the work. Plaintiff filed a mechanics' lien for the materials supplied by him, and a bill in equity to enforce the same against the reversionary interest of the defendant. Held, that under Code, Art. 63, sec. 9, the reversionary estate of the defendant was not subject to the mechanics' lien.

Appeal from a decree of Circuit Court No. 2, of Baltimore City (WICKES, J.), dismissing the bill of complaint. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

William L. Marbury and H. Snowden Marshall, for the appellant.

Very briefly, the plaintiff's contention, is that McColgan, when he made with Clarke this contract for the improvement of his property, thereby rendered his interest in the property liable to the liens of mechanics, from whom Clarke purchased materials to carry out this contract; and that this is not at all affected by the fact that McColgan's contract for improvement of his property was made with a

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lessee of that very property. Stated differently, the plaintiff contends that the mechanics' lien law applies as fully when an owner employs his lessee to improve his property, as when the owner employs any other builder to improve his property. There are two thoroughly established principles of the mechanics' lien law, the apparent conflict of which is the only source of difficulty in this case. The first of these is the fundamental principle of the mechanics' lien law, imposing a lien upon the estate of any owner's real property, who contracts for the improvement of that property, whether his contract be directly with the mechanic, or indirectly through a middleman. The second of the two principles is that declared in section nine of Article 63 of the Code: That where a building shall be erected by a lessee, the lien shall only apply to the interest of that lessee. On the one hand, McColgan has certainly so contracted with Clarke for the erection of improvements, as to give a lien against his, McColgan's estate to mechanics furnishing materials to Clarke; on the other hand, Clarke, who erected these buildings under this contract with McColgan, is a lessee of the property, and this is a case where a building is erected by a lessee. That is to say, Clarke is both a contractor for building, in which capacity he can impose a lien of McColgan's estate, and a lessee of the property, in which capacity he cannot impose such a lien; in which capacity is he to be treated in this case, involving as it does, the rights of others, entire strangers to these dealings between the lessor and lessee?

Upon the principle of mechanics' lien legislation, Hoffman claims a lien against McColgan's property. He asks in effect to be allowed to retain the ownership of his bricks until paid for them by Clarke, or Clarke's employer, McColgan. He denies McColgan's right to have his property improved by those materials, upon the payment merely of that sum agreed upon between McColgan and Clarke. By the law of fixtures, those bricks and those lots are now one inseparable piece of property; but by the mechanics' lien

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law, the owner of the bricks is part owner of that inseparable piece of property, to the extent that he has contributed to its increased value. By reason of the requirement of privity of contract, Hoffman cannot sue McColgan for the price of these bricks; but by the mechanics' lien law, the statutory obligation is imposed on McColgan to pay for them if he wants to derive a benefit from them to his property.

Making this claim, Hoffman finds it denied, because, it is said, another principle of law comes in and bars his right; that is, the principle that, when a lessee erects improvements, the lessor's estate is not subject to liens imposed thereby. This makes it necessary to carefully examine this other principle. The owner of an estate in property, in possession of the property, with full and exclusive powers to contract for buildings to be erected on the property, has no power to impose a lien on the estates in the same property owned by others not in possession, and not entitled to be in possession of the property. The party in possession is supposed to be contracting with reference to his own estate, and can bind that alone with liens. The immediate possessor has full power to contract; therefore, he and his estate must accept the full responsibility of the contract. The subsequent possessor has no power to contract; therefore, by no reasonable law can he or his estate be bound by the consequences of the contract. See *Beehler v. Ijams*, 72 Md. 197; *Leiby v. Wilson*, 40 Pa. St. 67; *Hill v. Gill*, 40 Minn. 44.

One contracting for the improvement of his property, binds with a lien his estate in that property, be that estate a fee, a reversion, a remainder, or even an equitable vendor's or lessor's estate. "Calling the contractors tenants will not avoid the ordinary incidents of a building contract. If it would, then might the owner escape the provisions of the mechanics' lien." BUTLER, P. J., in *Hall v. Parker*, 94 Pa. 111. And see *Henderson v. Connally*, 123 Ill.; *Hayes v.*

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Fessenden, 106 Mass. 228; *Lumber Co. v. Mosher*, (Wis.) 60 N. W. Rep. 264.

James McColgan, for the appellee.

The appellee contends that this case is directly within the very language of the Code, Article 63, section 9, which provides that "where a building shall be erected by the lessee or tenant for life or years, of a farm or lot of ground, or by an architect, builder or other person employed by such lessee or tenant, the lien shall only apply to the extent of the interest of such lessee or tenant." It is impossible to conceive a case falling more directly within the provisions of this law, or more clearly within its scope and intention. This Court has held in a series of cases, commencing in 7th Md. down to the present time, not only that cases falling directly within the language of the law were covered by it, but that cases which might for some reason or another be supposed to be without the scope and intention of the law, were also covered by this provision. *Beehler v. Ijams*, 72 Md. 195; *Lenderking v. Rosenthal*, 63 Md. 28, 34; *Gable & Beacham v. Preachers' Fund Society*, 59 Md. 458; *Mills v. Mayhew*, 7 Md. 321. This appears to be the first time that anyone has undertaken to ask this Court to repeal this law, which the maintenance of the appellant's contention would necessarily do.

ROBERTS, J., delivered the opinion of the Court.

The appeal in this case is taken from a decree of the Circuit Court No. 2, of Baltimore City. The material facts are, that on April 3d, 1894, the appellee executed a ninety-nine years' lease, in the usual form, to a certain Thomas F. B. Clarke. The consideration therein was stated to be one dollar, and the rent reserved was at the rate of six dollars per front foot. The lease was recorded on the day of its execution, and shortly thereafter, on the same day, the appellee and said Clark entered into an agreement, by the terms of which Clark was to build certain houses upon the leased premises, according to the specifications in said agree-

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ment particularly set forth. By the terms of said agreement, the appellee promised to pay to said Clark, "*as a bonus and not as a loan,*" the sum of \$500.00 upon each of said houses, during the progress of the work, in seven equal instalments, and upon the completion of said houses by said Clark, the appellee covenanted to deliver to said Clarke a full release for all ground-rent due and payable to the first of October, 1894. It was further stipulated therein, that upon the completion of said houses in all respects, according to the requirements of said agreement, and within ninety days thereafter, and upon thirty days' notice from said Clarke, the appellee would loan, or procure to be loaned to said Clarke, the sum of seven hundred dollars upon each of said lots so improved; provided said lots should be clear of all lien claims, charges and incumbrances, other than the ground-rent reserved thereon. Shortly after the date of said agreement, Clarke commenced the erection of the buildings mentioned therein, and on May 26th, 1894, informed the appellant of the terms of his lease from the appellee, which was then on record, and thereupon he agreed in writing with the appellant to purchase from him a large lot of bricks, which were delivered by the appellant, and used in the erection of said buildings. In the course of construction of said houses, the appellee was, by the terms of his agreement with Clarke, required to make certain payments to him, which he accordingly did. Clarke becoming financially embarrassed, discontinued work on the buildings when the appellant filed his lien, for the purpose of subjecting the reversion of the appellee in said lots to the payment of his claims. So that the question, which we are now called upon to determine, is whether the appellee's reversion in said leased premises can be subjected to the payment of the claim of the appellant for the brick furnished by him and used in the construction of said buildings. It is, we think, very clear that the appellee had no knowledge of the financial condition of Clarke at the time he contracted with him for the erection of the houses; and

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that before making said contract, he made such inquiries as were well calculated to favorably impress him with his ability to execute his contract. The appellant's own testimony shows that he knew from Clarke the nature of his contract with the appellee, and it was his duty, before delivering the bricks, to have satisfied himself as to the state of Clarke's title to the lots built upon. Certainly he was not misled by any act or representation of the appellee, with whom he had no intercourse whatever. Although the bill charges bad faith, arising out of the alleged fact that the rent reserved by the appellee wholly disproportioned to the value of the property, we fail to discover in the record anything justly tending to sustain any such contention. In this State little difficulty ought to be experienced in the determination of the question arising on this appeal. Section nine of Article sixty-three of the Code provides that "where a building shall be erected by a lessee or tenant for life, or years, of a farm or lot of ground, or by an architect, builder or other persons employed by such lessee or tenant, the lien shall only apply to the extent of the interest of such lessee or tenant." This provision of law has been frequently before this Court for construction, and its plain manifest meaning has been uniformly maintained. When a statute of this State has been passed upon by this Court, and received careful consideration and definite determination, as is the case here, it seems to us to be a fruitless effort to go out of the State to find how far other Courts may have differed with us as to the meaning of one of our statutes. We shall now make brief reference to some of the cases which we consider decisive on the question before us.

The first time this Court was called upon to consider the provision of the Code hereinbefore quoted, which is taken *in toto* *de verbo* from the 7th section of the Act of 1845, ch. 257, was in the case of *Mills v. Matthews*, 7 Md. 322. In that case Mills and Milburn entered into a written contract under seal, which was recorded the same day, and therein the former agreed to sub-lease to the latter, for ninety-eight

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years, renewable forever, a lot of ground in the city of Baltimore; Milburn agreeing to erect on the lot, at his own cost and expense, five brick dwelling houses, and Mills contracting to advance, as a loan to Milburn to aid him in the erection of the houses, the sum of \$300 on each house. Milburn covenanted that the houses should be finished and that he would repay the money advanced and all interest thereon on or before the 1st of January, 1853. Milburn contracted for the materials. The money was loaned as stipulated, and upon the failure of Milburn to complete the houses and comply with his contract, the property being sold, the question arose between Mills, who claimed to recover the advances made, and the material-men. This Court said, "as by the Act of 1845, the liens of the material-men can only attach upon the interest of Milburn, they can only claim to the extent of his rights founded upon the agreement which gave them existence." The Court further said in that case, that the liens of the material-men could only attach to the interest of Milburn. Then followed the cases of *Gable v. The Preachers' Fund Society*, 59 Md. 456; *Lenderking v. Rosenthal*, 63 Md. 34, and *Beehler v. Ijams*, 72 Md. 195, in all of which cases the doctrine as announced by this Court in *Mills v. Matthews, supra*, is sanctioned and affirmed. After careful examination of the doctrines announced by the Courts of other States, we have, on a state of facts such as the record in this case presents, found very few decisions at variance with the views herein expressed. Mr. Phillips, in his work on Mechanics' Liens, §§ 89, 90, in concluding a thorough examination of this subject, says: "It may therefore be asserted, unless the law-making power expressly or by necessary implication enact otherwise, that a lessee cannot, without the consent of the lessor, bind the reversion to answer for the improvement or repairs which he may erect upon the premises." It may be that loss and hardship have followed the appellant's venture, but this is not such a case as Courts can relieve against, for the reason that it would never have been possible that loss could have come to the

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appellant if he had exercised, in some reasonable degree, proper caution and prudence. But this he did not do, and has only himself to blame for his misfortune. The views herein expressed are in exact concurrence with those of the learned Judge who decided the case below, and we therefore affirm the decree.

Decree affirmed with costs.

(Decided June 18th, 1895.)

PETER H. HEISKELL, JR., *vs.* HESTER J. ROLLINS.

Entry of Judgment on Verdict Pending Motion for New Trial.

Where, after a verdict for the plaintiff, the defendant moves for a new trial, there can be no final judgment on the verdict until the motion for a new trial is overruled or otherwise disposed of.

The record in this case showed that on October 6 there was a verdict for the plaintiff, and that on the same day judgment was entered thereon, and a motion for a new trial filed; that the motion was overruled on January 2 following, on which latter day an appeal was prayed, but there was no entry of a judgment after the motion was overruled. Upon a motion to dismiss the appeal, because not taken within two months after final judgment, *Held*, that it must be assumed that there was a mistake in the entry of the judgment on the verdict while the motion for a new trial was pending; and since there was nothing to show a judgment after it was disposed of the appeal must be dismissed without prejudice, on the ground that no final judgment had been entered, to the end that the appellant may have the entry of judgment on October 6 stricken out and final judgment entered.

Appeal from the Circuit Court for Prince George's County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, JJ.

W. I. Hill (with whom was *Chas. H. Stanley* on the brief), for the appellant.

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George C. Merrick, for the appellee, submitted the cause upon his brief and motion to dismiss the appeal.

ROBINSON, C. J., delivered the opinion of the Court.

The motion to dismiss the appeal in this case is made on the ground that the appeal was not taken within two months after final judgment was entered, as required by the Code, Art. 5, sec. 6. The docket entries show that the judgment was entered 6th October, 1894, and that the appeal was taken on 2nd January, 1895. If the matter rested here, we should be obliged to dismiss the appeal, for the reason that it was not taken within two months after judgment was rendered. But the docket entries also show, that the verdict was rendered on the *6th October, 1894*, and that judgment on verdict was entered on *the same day*, and that on the *same day* a motion for new trial was made, and reasons in support of the motion were filed; and they further show, that the motion for new trial was not disposed of until *2nd January, 1895*. The Court could not, of course, have entered final judgment on the verdict until the motion for new trial was overruled or otherwise disposed of.

At common law it was incumbent on the plaintiff, after verdict, to enter a rule for judgment *nisi causa*, and this rule expired in four days. Within the four days the defendant had the right to move for *new trial* or arrest of judgment, and unless the motion was made within that time the right was gone. In *Clerk v. Rowland*, 1 Salked, 399, it is said: "So where there is a verdict there must be four days between the verdict and the judgment." "Therefore, after verdict or writ of inquiry, the course is for the plaintiff to give a rule to enable him to enter his judgment *nisi causa*." In the Court of King's Bench, the day on which the verdict was entered was not reckoned one of the four days, and the four days were computed exclusive of the day on which the rule was made. In the Court of Common Pleas, however, the practice was to include the day on which the rule was made. 3 Salk. 215. And in *Standfast v. Chamberlaine*, 3 Salk.

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215, the judgment was set aside because it had been entered before the expiration of the four days, as required by law. Now, in this case, the judgment was entered on the day the verdict was rendered, although the plaintiff had on that day filed a motion for a new trial, with reasons in support of such motion. And it further appears by the docket entries, that this motion was not disposed of until 2nd January, 1895. We must assume, therefore, that there was some mistake on the part of the clerk in entering final judgment on the day the verdict was rendered, and whilst the motion for a new trial was pending. And if so, no final judgment has been entered on the verdict, because the record shows that the motion for a new trial was overruled 2nd January, 1895, but it does not show that judgment was entered on that day, or on any day subsequent thereto. And if this be so, the appeal must be dismissed on the ground that no final judgment has been entered.

We shall therefore dismiss the appeal without prejudice, in order that the appellant may take such steps as he may deem necessary to have the entry of judgment which was improvidently entered stricken out and final judgment entered, which could not be entered until the motion for new trial was disposed of.

Appeal dismissed without prejudice.

(Decided June 18th, 1895.)

THE BALTIMORE AND POTOMAC RAILROAD COMPANY *vs.* ELIZABETH SWANN AND WILLIAM T. SWANN.

Carriers—Negligence—Injury to Passenger Carried in a Baggage Car—Right of Ticket Holder—Presumption of Negligence.

A party who buys a railroad ticket acquires a right to be conveyed to his destination in one of the carrier's passenger coaches.

If the carrier, being unable from causes beyond his control, to provide a passenger coach, according to its contract, substitutes a baggage car, and in the course of the journey, by reason of some fault in the vehicle, the passenger is injured, the carrier is liable therefor, unless it can show that it exercised the utmost care and diligence, and that the baggage car was a safe conveyance.

In such case it cannot be imputed to the passenger as negligence, or as an assumption of the risk, that he took passage in the baggage car, when no other means of conveyance were offered.

Whether in this case the carrier made diligent effort to procure a passenger coach, and whether the baggage car was a safe vehicle, are proper questions to be submitted to the jury.

And in this case a prayer based upon a comparison between the injuries complained of by the plaintiff as received in the baggage car and those that might have been suffered in a passenger coach, should be rejected, because altogether conjectural.

The fact that a passenger is injured while travelling on a train of defendant is *prima facie* evidence of negligence, throwing upon the carrier the burden of showing that the injury could not have been prevented by the exercise of the utmost care and diligence on its part.

Appeal from the Circuit Court for Charles County. This was an action to recover damages for an injury alleged to have been sustained by the female plaintiff while a passenger on the defendant's train. The evidence and the first three prayers of the plaintiffs, which were granted, are set forth in the opinion of the Court. At the trial the defendant offered the following prayers:

1st Prayer.—If the jury shall find that the drag-rope used

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in shifting the cars of the defendant at Pope's Creek had been broken or cut in shifting the cars on the afternoon or evening of May 10th, 1893, and that therefore there was no drag-rope on the train on May 11th, 1893, the day on which the injuries complained of are said to have occurred, a drag-rope not being obtained until the morning of May 12th, 1893 ; then the jury shall further find that there was no negligence on the part of defendant's servants or agents in charge of the train in the switching off of the passenger coaches at Cox Station on the arrival of the train on the afternoon or evening of May 11th, 1893, and in their proceeding to Pope's Creek with the engine and baggage car alone ; and the verdict of the jury must therefore be for the defendant, unless the jury further find there was some negligent act or conduct on part of defendant's agents or servants towards the plaintiff, Elizabeth Swann, on said trip from Cox Station to Pope's Creek, or some accident to the said baggage car or train from the negligence of defendant's agents or servants, which caused or directly contributed to the injury or sickness or pain complained of. (Rejected.)

2nd and 3rd Prayer.—If the jury shall find that the defendant's agents or servants ran only a baggage car, with the engine, from Cox Station to Pope's Creek, on the afternoon or evening of May 11th, 1893, on account of the danger of shifting cars at the latter place in the absence of a drag-rope ; and shall further find that the plaintiff, Elizabeth Swann, voluntarily entered said baggage car, or accepted passage therein without complaint or objection on her part, either before or after entering said car, and that after so entering said car she was given the best accommodations and seat the car afforded, whether it were an arm-chair without legs, flat at the bottom, placed on an iron chest or safe 24 inches long, 16 inches wide and 16 inches high, without rollers, with a flat top and bottom, weighing about 100 or 125 pounds, resting on the floor near the side of said car, or a cushion placed on said chest, and that then the engine, with said baggage car attached, proceeded with

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due care and caution at a rate of speed not exceeding 20 or 25 miles per hour, or less than the usual rate of speed on other portions of the line, and without any stops to Pope's Creek, when the said plaintiff either got off or was assisted off by the agents of the defendant, then the plaintiffs are not entitled to recover, notwithstanding the jury may further find the said plaintiff, Elizabeth Swann, had a passenger ticket for the trip, denominated first-class. (Rejected.)

6th Prayer.—If the jury shall find that the plaintiff, Elizabeth Swann, suffered a miscarriage or abortion, as testified to by her and others, and that said miscarriage or abortion was caused partly by her trip from Cox Station to Pope's Creek, in the baggage car of defendant, on May the 11th, 1893, and partly by the running or walking and other exertions of the said plaintiff, on that day, then their verdict must be for the defendant. (Rejected.)

7th Prayer.—If the jury shall find that the plaintiff, Elizabeth Swann, just before entering the baggage car of the defendant, on the day in question, ran or walked rapidly, with a ten-months-old child in her arms, a distance of about two hundred and fifty yards, and on reaching Pope's Creek on said car, walked one or one and a-half miles, part the way up a long hill, and shall still further find that the effort and exertion and excitement in so running or walking caused the miscarriage or abortion, or the sickness or pain or injury complained of by her, then their verdict must be for the defendant. (Rejected.)

8th Prayer.—If the jury shall find that the plaintiff, Elizabeth Swann, was not jostled on her trip from Cox Station to Pope's Creek in the baggage car of the defendant, on the 11th day of May, 1893, more than was inevitable while the train was running over that portion of the road, at the usual rate of speed of not more than 20 or 25 miles per hour, then their verdict must be for the defendant. (Rejected.)

9th Prayer.—Before the plaintiffs can recover in this case,

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the jury must find that the miscarriage or abortion (if any there were) and all the sickness or pain suffered by the plaintiff, Elizabeth Swann, following her trip from Cox Station to Pope's Creek, in the baggage car of the defendant, on the 11th day of May, 1893, were caused directly and exclusively by injuries sustained by her on said trip on account of the negligence of the defendant ; and that the said plaintiff, Elizabeth Swann, in no way contributed thereto. (Rejected.)

10th Prayer.—If the jury shall find that the plaintiff, Elizabeth Swann, would, on account of the curves in the road, have been jostled, even had she been seated in a regular passenger coach, on her trip from Cox Station to Pope's Creek, on May 11th, 1893, and would, if so seated, have been as liable to the injuries complained of as if she had been seated in a baggage car in the manner and way described by the witnesses who have testified in this case, then their verdict must be for the defendant. (Rejected.)

11th Prayer.—If the jury shall find that the injuries and sickness complained of were in any degree owing to the want of due care and caution on the part of Elizabeth Swann, the plaintiff, directly contributing to the said injuries or sickness, then their verdict must be for the defendant. (Rejected.)

12th Prayer.—Notwithstanding the jury shall believe from the evidence that the defendant was guilty of negligence ; yet, if they shall further believe from the evidence, that the plaintiff, Elizabeth Swann, was also guilty of negligence, and that the injuries or sickness complained of was directly caused partly by the defendant's negligence and partly by the negligence of the plaintiff, Elizabeth Swann, then the verdict of the jury must be for the defendant, without regard to whose negligence was the greater. (Rejected.)

The Court below (BRISCOE, C. J., and BROOKE, J.), granted the fourth and fifth prayers of the defendant, and rejected the others. The jury returned a verdict for the plaintiff for

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\$1,000, and from the judgment thereon the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and ROBERTS, JJ.

John J. Donaldson (with whom were *Bernard Carter, L. Allison Wilmer* and *Samuel Cox, Jr.*, on the brief), for the appellant.

The plaintiff's second and third prayers involved the question of the burden of proof, and are an attempt to apply to the circumstances of this case the doctrine of *res ipsa loquitur*, which, it is submitted, is entirely inapplicable; in the first place, there is no room for the invoking of a presumption as to the cause of any injury when there is direct testimony as to the same; in other words, the proof of the fact disables the presumption. *Neubur v. Md. C. R. R. Co.*, 62 Md. 401; *P. W. & B. R. R. Co. v. Stebbing*, 62 Md. 518; *Redgrave v. Redgrave*, 38 Md. 93, 98; *Blackburn v. Crawfords*, 3 Wall. 195; *Owings v. Norwood*, 2 H. & J. 96, 107; *Colvin v. Warford*, 20 Md. 396; *Beale v. Lynn*, 6 H. & J. 336, 351; *Andrew's case*, 39 Md. 329. But, moreover, even were there no direct proof, the injury in this case was not of a kind to raise any such presumption. *Flannery v. W. & L. Railway Co.*, Irish Reps. 11 Common Law, 30; *Daniel v. Metropolitan Railway Co.*, L. R. 5 House of Lords, 45; *B. & O. R. R. v. State*, 63 Md. 143; *Western Md. R. R. v. Stanley*, 61 Md. 266; *Curtis v. R. & S. R. R.*, 18 N. Y. 534; *Le Barron v. Terry Co.*, 11 Allen, 312; *Met. Ry. Co. v. Jackson*, L. R. 3 App. 193.

The plaintiff's first prayer is defective, as imposing upon defendant the same degree of care and skill with regard to the convenience provided for the passenger as with regard to the passenger's carriage.

It is also defective inasmuch as it entirely ignores the testimony with regard to the plaintiff's voluntary assumption

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of the risk, such as there was. This prayer also, like all the others that go to the question of liability, ignores the true test of a carrier's duty with regard to the accommodation furnished his passengers, namely, that he is bound to the extent of his profession. *Story on Bailments*, sec 591; *Johnson v. R. W. Co.*, 4 Ex. 367. And it does not leave it to the jury to say that this was a regularly scheduled passenger train, upon which the defendant had a right to expect regular passenger coaches, as indeed it could not, because there is no evidence thereof in the record.

The plaintiff's fourth prayer is defective, inasmuch as it ignores the assumption of the risk by the plaintiff, as shown in Thompson's testimony, which is quite a different question from contributory negligence on her part. This assumption of the risk, it is clear, if the jury believed the fact as testified to by that witness, would relieve the defendant from responsibility. *Siner v. G. W. R.*, L. R. 3 Ex. 150; *S. C. (on Appeal)*, L. R. 4 Ex. 117, 124; *Del. & L. R. R. v. Naphcys*, 90 Pa. St. 135; *Dietrich v. R. W. Co.*, 58 Md. 358.

The plaintiff's fifth prayer is defective, in the first place, because it treats the question of the plaintiff's attempting to make the journey in a baggage car as a matter of contributory negligence, instead of an assumption of the risk (see authorities cited above); and is further defective in that it instructs the jury that this was no bar to recovery, if defendant's servants in charge of the car could have prevented the injury complained of by the exercise of ordinary care; now, even if it were a contributory negligence case, this doctrine only applies where the defendant's servants have actually become aware that the plaintiff was in a position of danger, and should be further limited by leaving it to the jury to say that they could have avoided the injury by such means as they had at hand. But a reference to some of the authorities, in which this doctrine has been applied, will show better than anything else that it has nothing to do with a case such as this at bar, as for instance, *Kean v. B. & O. R. R.*, 61 Md. 154; *Harvey's case*, 69 Md. 339.

The defendant's second and third prayers are founded upon the assumption of the risk, and should have been granted, it is submitted, as laying down the true rule applicable to a case of this character. The seventh prayer of the defendant instructs the jury that if the injuries suffered by her were caused by her own over-exertion and excitement in running or walking on the day in question, then the verdict must be for the defendant; this is founded on the testimony of Drs. Spencer and Diggs, and it is difficult to say upon what theory it was rejected; because, certainly, if her injuries were caused by something other than the circumstances of her railroad trip, the defendant could not be liable. The defendant's ninth, eleventh and twelfth prayers simply put to the jury the ordinary doctrine with regard to contributory negligence, and it is submitted should have been granted. The defendant's eighth and tenth prayers, it is submitted, should have been granted in connection with each other, as founded on the principle that the female plaintiff, being familiar with the line of defendant's road, assumed the risks ordinarily incident to the journey over a line of that character, especially in view of the entire absence of proof that any different structure of the line was consistent with the nature of the defendant's undertaking.

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John H. Mitchell and Adrian Posey, for the appellees.

BRYAN, J., delivered the opinion of the Court.

William T. Swann and Elizabeth, his wife, brought suit against the Baltimore and Potomac Railroad Company for bodily injuries sustained by the wife. Verdict and judgment being rendered in their favor, the defendant appealed.

The female plaintiff, about midday on the eleventh day of May, 1893, accompanied by her child ten months old, travelled on the mixed train of the defendant, composed of

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passenger coaches and freight cars, from Pope's Creek to Cox's Station, intending to return on the evening of the same day. She purchased a ticket at Cox's Station for the purpose of taking the passenger train which would in ordinary course leave that station about seven o'clock, P. M. The passenger coaches were "switched off" at Cox's and only a baggage car was run from that station on that evening to Pope's Creek. She entered that car and was conveyed to Pope's Creek. The evidence in behalf of the plaintiffs tended to show that the accommodations were very uncomfortable and unsuitable for travellers ; and that in consequence of the absence of all conveniences she "was shaken up and knocked about from side to side, and slammed against the side of the car several times, and that immediately after one of these slams, when she was struck in her right side by the side of the car, she experienced a pain there, which was followed by a pain in her back." The evidence also tended to show that the woman was pregnant, and that the injuries which she received caused a miscarriage and that she had suffered pains in her back and side almost constantly for six months. The evidence for the defendant tended to show that she was not thrown about or jostled. It was further testified, that the cars could not be shifted at Pope's Creek without special danger, unless a drag-rope was used ; and that the drag-rope used for this purpose had been broken in two on the evening of the tenth, having been before that time weakened by being run over by cars ; that the conductor had telegraphed for one on the morning of the ninth, and thereafter, on reaching Baltimore, had applied at the office of the company, but that none was received until the morning of the twelfth. The female plaintiff was a laboring woman, being in the habit of washing, cooking and working in the field. She lived about a mile or a mile and a-half from Pope's Creek, and at the time of these occurrences she had three children. She went to Cox's on a visit to the family of Thompson, a section hand on the railroad,

who lived about half a mile from the station. There was some conflict of evidence in reference to the cause of the alleged miscarriage, the defendant's testimony supporting the theory that it was more likely to have been caused by the woman's exertions and the excitement consequent upon them before she entered the cars, and after she left them, than by any injuries received while travelling in them.

When the female plaintiff purchased a ticket at Cox's Station, she acquired a contract right to be conveyed to Pope's Creek, in one of the defendant's passenger coaches. If we assume that causes beyond the defendant's control prevented the use of a passenger coach on that occasion, the obligation still remained to carry the passenger safely, so far as it could be done by the exercise of the highest degree of care and skill which was consistent with the nature of the undertaking. If the baggage car was as safe a vehicle of transportation for passengers as the defendant could procure by the utmost care and diligence, it fulfilled its duty in this respect. There is no evidence to sustain such an hypothesis, and probably it is contrary to the usual experience of travellers. And yet, as the defendant substituted it for the passenger coach which it was bound by its contract to furnish, the least which could be demanded of it would be some reasonable effort to make it safe and convenient for a passenger. If the passenger was injured in the defendant's cars in the course of her journey, and in consequence of some fault or defect in the vehicle of transportation, the defendant is clearly liable for the injury, unless it can show the utmost care and diligence on its part. And we think that these are the proper inquiries for the jury in this case. It cannot be alleged against the passenger as fault or negligence that she took passage in the baggage car. She had a right to be conveyed by the defendant, and she was constrained to travel in this way or not be conveyed at all. Domestic duties of the most pressing kind required that she should return that night to Pope's Creek. It would

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be unreasonable to hold that she had made a voluntary choice, whereby she had in this way renounced the right to safety and protection which she had purchased.

The Court granted six prayers in behalf of the plaintiff. Exception was taken to only three of them. They are as follows: 1st. If the jury believe from the evidence that the defendant was the owner of the railroad mentioned in the declaration, and sold the plaintiff, Elizabeth, a ticket entitling her to travel on said railroad, and received and accepted her as a passenger to be carried from Cox to Pope's Creek on the line of said railroad, then defendant was bound to exercise on said trip, for plaintiff's safety, the highest degree of care and skill which was consistent with the nature of its undertaking.

2nd. If the jury believe from the evidence that the plaintiff, Elizabeth Swann, was injured whilst a passenger on a train of the defendant, the fact of such injury is *prima facie* evidence of negligence on the part of the defendant, throwing upon it the *onus* of rebutting the presumption, by showing there was no negligence on its part.

3rd. That in order to rebut the presumption of negligence on its part, the defendant must show that the injury sustained by said plaintiff while travelling as a passenger on its train; if the jury find that she was so injured, could not have been prevented by the utmost care and diligence, not only in the running and management of the train, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.

These prayers are taken almost *verbatim* from opinions of this Court. *Baltimore and Ohio Railroad v. Worthington*, 21 Maryland, 283; *Same v. State use of Haner*, 60 Maryland, 462; *Hewes and Wife v. Philadelphia, &c., R. R. Co.*, 76 Maryland, 159. The three prayers of the defendant which seek to excuse the failure to use a passenger car, because of the want of a drag-rope, do not require the jury

to find that the defendant made a diligent use of the means at its command for the purpose of enabling it to use the car. The first prayer puts it to the jury to find that the drag-rope was broken on the evening of May the tenth, and that no other was obtained until the morning of May the twelfth ; but they are not by the prayer required to find that the defendant made a diligent effort to obtain the rope, or that it made any efforts to supply other means of running the car to Pope's Creek. And none of these prayers require the jury to find that the baggage car was a safe conveyance for passengers. The sixth and seventh prayers deny the plaintiff's right to recover, if the miscarriage was caused, in part, by the action of the female plaintiff in making physical exertions and undergoing excitement before she entered the baggage car and after she left it. But even if there could be no recovery for the miscarriage, the pain inflicted and injury sustained in the car would support a verdict, if found by the jury. The same remark will apply to the ninth prayer, which denies a recovery, unless the miscarriage was caused directly and exclusively by injuries sustained on the trip on account of the negligence of the defendant. The eighth prayer makes no reference to the question of the safety of the baggage car as a conveyance for passengers. The tenth prayer institutes a comparison between the injuries complained of, and those to which the female plaintiff would have been liable if seated in a regular passenger coach. It is altogether conjectural what she might have suffered in a regular passenger coach, and such a conjecture cannot be made a basis for the verdict of a jury. The ground of recovery is the absence of the proper degree of care and diligence on the part of the defendant, provided it is shown to the satisfaction of the jury, and not what might have occurred elsewhere.

The eleventh and twelfth prayers present the question of contributory negligence. There is no evidence from which any negligence on the part of the female plaintiff can be

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inferred, except such as tends to show that the miscarriage may have been caused in some measure by the fatigue which she underwent before she reached the cars at Cox's, and after she left them at Pope's Creek. We have already stated our views on this question. But we may further say, that the plaintiff's fourth prayer, granted by the Court, confines the recovery to the injuries sustained by the female plaintiff whilst "*making said journey.*"

All the defendant's prayers, which we have been considering, were rejected by the Court and we approve of the ruling.

Judgment affirmed.

(Decided June 18th, 1895.)

JOS. WALTER SMITH, INFANT, BY NEXT FRIEND, *vs.*
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Benefit Societies—Insurance—False Statement in Application for Membership—Beneficiary.

When it is agreed that the statements contained in an application for membership in a Relief Association shall constitute a warranty and their truth a condition of payment, then a statement by the applicant that he was married to the person named as beneficiary when in fact he was not, vitiates the contract of insurance and defeats the right of any one to recover thereon.

When a certain person is named as the beneficiary in the insurance contract of a Relief Association, only that person has a right to sue thereon.

The Relief Department of the defendant company makes payments to members disabled by injury, or to their families in the event of death. The person named as beneficiary in the contract was required to be the wife or relation of the party insured. Membership in the Association was obligatory upon certain classes of defendant's employees as a condition of employment, and voluntary with other classes. The truth of the statements contained in the application for membership was made by the contract a warranty and condition of the payment of benefits. S., the father of the plaintiff, was divorced *a vinculo* from plaintiff's mother under a decree prohibiting his re-marriage during her life. He became a member of the Association, falsely stating in his application that the beneficiary therein named was his wife. Upon the death of S. the plaintiff, his son, sued to recover the death benefit. *Held,*

1st. That plaintiff was not entitled to recover, because the false statement in the application avoided the contract, and also because the plaintiff, not being named as beneficiary, could not maintain the action.

2nd. That even if the deceased was obliged, as a condition of employment by the defendant, to become a member of the Association he was not thereby relieved from the obligation to state the facts truthfully in his application.

Appeal from a judgment of the Court of Common Pleas (HARLAN, C. J.), sustaining a demurrer to plaintiff's declaration. The case is stated in the opinion of the Court.

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The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Alfred Hughes (with whom was *Thomas Hughes* on the brief), for the appellant.

Geo. Dobbin Penniman (with whom was *John K. Cowen* on the brief), for the appellee.

PAGE, J., delivered the opinion of the Court.

The declaration in this case alleges that Philemon James Smith, employed in the service of the B. & O. R. R. Co., entered into an agreement with that company, whereby he was received into membership in "The Relief Feature for natural death benefit" of the company ; that by this agreement, in consideration of the payment by the said Smith of certain dues, said Railroad Company, upon the death of said Smith, was to pay to a beneficiary or beneficiaries named in the application for membership of the said Smith, in the event of his death, the sum of one thousand dollars, leaving or permitting the said Smith to name said beneficiary, with the restriction, however, that if he should be married, it must be to his wife or children, or if he be single, in the sense of not having been married, and having no children, it must be his father or mother, or the survivor, and that no one could be entitled as a beneficiary who was not the widow or a relation not more remote than a first cousin, or if no such beneficiary should be named or should be living at the time of the member's decease, then the death benefit was to be paid to the party or parties who were next of kin, as determined by the laws of the State of Maryland. That said Smith was married to the mother of this plaintiff, from whom she was divorced *a vinculo matrimonii*, by a decree of the Circuit Court for Frederick County, in Equity, with the statutory restriction prohibiting the said Smith from subsequently marrying during the lifetime of the plaintiff's mother, who is still living. That said Smith named as beneficiary, to receive said benefit, a certain party *untruthfully*

alleged by him in his said application to be his wife. That said Smith was not single in the sense provided for by the contract entered into between the said company and the said Smith." The *narr* further alleges, that all payments to entitle the next of kin, &c., were made ; that the plaintiff is the only child and next of kin of the said Smith (who died on the 12th April, 1891), he being the child of the said Smith and of his wife to whom said Smith had been married, and is therefore entitled to claim the said benefit. The defendant demurred ; the Court sustained the demurrer, and on entering its judgment the plaintiff appealed. At the hearing below, it was agreed between the parties "that the regulations governing the Relief Department of the Baltimore and Ohio Railroad Company shall be filed as a part of the declaration as a whole."

The "Relief Feature" of the "Relief Department of the B. & O. R. R. Co.," as appears from the regulations, has for its objects the "relief to its members entitled thereto when they are disabled by injury or sickness, and to their families in the event of their death." Membership is voluntary to certain specified classes, but obligatory upon all others in the service, "as a condition of employment or advancement." To entitle an employee to participate in the relief afforded by the "Relief feature," he must execute an application in one of the forms prescribed in the regulations, and pass a satisfactory medical examination ; and this application, when accepted by the superintendent, constitutes a contract of employment. One of the provisions of the application is as follows : "I understand and agree, that this application, when accepted by the superintendent, shall constitute a contract between me and the said company, by which my rights as a member of the Relief Feature and as an employe of said company, shall be determined as to all matters within its scope ; that each of the statements herein contained, and each of my answers to the questions asked by the medical examiner and hereto annexed, shall constitute a warranty by me, the truth whereof shall be a condition of payment of

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the benefits aforesaid." In the event of death, the sum due for "death benefits" is to be paid to a person named in the application or to whomever the employe may from time to time designate in writing by way of substitution, with the written consent of the superintendent, or if no beneficiary named be then living, to his next of kin ; all, however, subject to Regulation 18, which provides that the "beneficiary or beneficiaries named in any application for full membership, if the applicant be named, must be his wife, or his wife and children. If he be single, the beneficiaries must be his father and mother or the survivor. No application will be accepted which does not comply with these requirements, unless the superintendent waive the same for reasons satisfactory to him, &c."

It will be thus seen that the application is the contract between the parties, and as such forms the only foundation for the action against the company. According to its terms it was agreed that each of the statements therein contained "shall constitute a warranty," "the truth whereof shall be a condition of payment of the benefit." The *narr* alleges that Smith named as the beneficiary "a certain party, untruthfully alleged by him to be his wife." This false statement, so manifestly material, in view of the warranty of its truth, and the agreement that its truth shall be a condition of payment, vitiates the agreement, and thereby defeats the right of any one to recover upon it. *Bliss on Life Ins.*, sec. 42 ; *Burnett v. Saratoga M. F. Ins. Co.*, 5 Hill, 188 ; *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. 5 ; *Campbell v. N. E. M. S. Ins. Co.*, 98 Mass. 381 ; *Sup. Council of Am. Legion of H. v. Green*, 71 Md. 268.

Apart from this, however, the plaintiff not having been named as the beneficiary, is not the proper person to sue. Only the person named has this right. *Bliss on Life Ins.*, sec. 318 ; *Niblack on M. Benefit Soc.*, sec 301, and authorities there cited.

The appellant contends, that in this case these principles do not apply, because the contract is one which the insured

was obliged and required to enter into with the company. There is nothing in the *narr* to indicate that Smith did not belong to the class of employes with whom membership in the "Relief Feature" was voluntary. And even if there was, we would then be unable to say that his becoming a member could be regarded as an involuntary act on his part. If he was not in the excepted classes, he was required, as a condition of employment, to become a member. But the service itself was voluntary. If he entered into it, he must become a member, but there was no compulsion in reference to it. Certainly there is nothing in the fact that membership was a condition of employment, that could operate to relieve him from the obligation to be truthful, or if he has, in fact, made false statements, that should relieve him from that clause in his contract, in which he expressly stipulated that "each statement shall constitute a warranty, the truth whereof shall be a condition of payment of the benefit."

Judgment affirmed.

(Decided June 18th, 1895.)

JOHN M. LITTIG, EXECUTOR, &c., AND CASSANDRA
A. KIRK *vs.* ELIZA G. HANCE AND OTHERS.

General and Specific Legacies—Ademption of Legacy—Gift of Debts—Gift of a Fund—Erroneous Description—Appeal by Executor.

There is a distinction between a gift in a will of a debt as a debt, and the gift of the sum of money produced when the debt has been recovered. In the first case the legacy is specific and the collection of the debt in the testator's lifetime will adeem the legacy. In the other case the gift extends to and includes the fund in its altered state.

A legacy will not be construed to be specific rather than general, unless the language of the will imperatively requires it.

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When a fund is given subject to debts, or subject to other legacies, then a gift of the residue is not specific.

An erroneous addition to the description of the thing given by a will does not defeat the gift, when the thing is otherwise sufficiently identified, but in such cases the question is, conceding the mistake, is the intent clear upon the whole language employed.

A debt is money due upon a contract ; there must therefore be a creditor and a debtor as well as a sum due, and a contract out of which the indebtedness arises before there can be a debt.

A testatrix bequeathed as follows after certain small legacies: " And whereas the estate of my late husband, S., is indebted to me in a large sum of money for dividends, &c., to which I am entitled under the terms of his will, and also all moneys that may be due and owing to me from his estate and my late son F., after the payment of the money legacies hereinbefore mentioned, I give and devise the same absolutely to my sister-in-law, C." Under the will of the deceased husband of the testatrix, she was entitled to a life-estate in one-third of his property and certain sums were due to her as interest thereon at the time of the execution of her will. She was also then entitled to a sum as her share of commissions as an executrix of his will. She was also entitled to a sum from the sale of a business which had been conducted by her deceased son, F. After the execution of her will these sums of money were all collected by her, or by her executor, deposited in bank to her credit, and a part thereof invested and a part otherwise disposed of. *Held,*

1st. That the legacy in the above cited clause was not a specific legacy of these debts as debts, and was consequently not adeemed by their collection in the lifetime of the testatrix.

2nd. That although the sums of money bequeathed were mentioned in the will as debts, yet they were not such strictly speaking, and the intention of the testatrix was to give the money to be realized from the specified sources ; the words used being only descriptive of the then situation of the sums intended to be bequeathed.

3rd. That the will speaks from the death of the testatrix and not from its date, and carried whatever fund the testatrix possessed at her death, however invested, that answered the description in the will, and this description included all the moneys to which the testatrix was entitled from her husband's and her son's estates, whether collected by her in her lifetime or not.

When a bill is filed by an executor for the construction of the will of his testator, he has a right to appeal from a decree construing the same.

Two appeals, the one by Littig as executor, and the other by Cassandra A. Kirk, from the Circuit Court of Baltimore

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City. The case is stated in the opinion of the Court. The Court below (DENNIS, J.), decreed: "That by the true interpretation of the last will and testament of Eliza G. Hance, the testatrix, a certified copy whereof has been offered in evidence, the legacy thereby given absolutely to Cassandra A. Kirk, the sister-in-law of the testatrix, of the indebtedness to the testatrix from the estate of her late husband, Seth S. Hance, in a large sum of money for dividends, &c., and also of all moneys that might be due and owing to the testatrix from the estate of Seth S. Hance and her late son, Franklin I. Hance, after the payment of the money legacies mentioned in the will of the testatrix, was a specific and not a general legacy, and was intended to embrace only indebtedness due at the time of the making of the will and remaining unpaid at the death of the testatrix, but did not embrace current income accruing after the date of the will to the testatrix as life-tenant of her husband's estate."

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE and BOYD, JJ.

Sylvan Hayes Lauchheimer, for the appellant, Mrs. Kirk.

Where the bequest is broad enough to admit of the construction that the proceeds of the debt was meant, then there is no ademption, even though the debt be paid during the lifetime of the testator. 13 *Am. & Eng. Ency. of Law*, p. 76, note; *Navey v. Vaunoy*, 6 Jones, ch. 188; *McNaughton v. McNaughton*, 34 N. Y. 205; *Smith v. Fitzgerald*, 3 Ves. & B. 5; *Clark v. Brown*, 2 Sm. & G. 529, 530; 2 *Leading cases in Eq.*, pt. II, pp. 673-4. Where the gift is of a debt, and the debt is collected during the lifetime of the testator, and the proceeds have been segregated and can be followed, then the legatee is entitled to that portion which can be traced. *Clark v. Brown*, 2 Sm. & G. 529; *Dougherty v. Stilwell*, 1 Bradf. 307, 308. The principle of these decisions seems to be that if the fund, instead of being destroyed, remains the same, with unimportant alterations,

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such slight variations will not deem the bequest. *Dougherty v. Stilwell*, 1 Bradf. 307.

The mere fact that something which is described as being due to the testator, is bequeathed, and the thing thus bequeathed is paid to the testator during his lifetime, does not work an ademption of the legacy. *Coleman v. Coleman*, 2 Vesey, Jr., 639; *Atty. Genl. v. Parkin*, Ambler, 566; *Bronson v. Winter*, Ambler, 59; *Boyce v. Williams*, 2 Rus. & Myl. 689; *LeGrice v. Finch*, 3 Merivale, 50; *Kirby v. Patter*, 4 Vesey, 748; *Gillicaume v. Adderley*, 15 Vesey, 384; *Sparrow v. Joselyn*, 16 Beav. 135.

Does not the well-known principle of law, that a partial intestacy is never favored, and that the Courts will construe otherwise, wherever it is possible so to do, supply a most potent confirmation of the general intent, as expressed in the will? Unless the testatrix meant that Mrs. Kirk should have all the moneys derived from the sources indicated, and unspent at the time of her death, there will be a partial intestacy, and Mrs. Kirk could receive those moneys only due to Mrs. Hance at the time of the making of this will, and unpaid at the time of her death. It is submitted that the predominant idea of the will is against such a construction, and clearly shows that the testatrix meant Mrs. Kirk to have everything, except the specific legacies of furniture and the pecuniary legacies, aggregating \$1,700.

In view of the surrounding circumstances, it certainly could not be said that the testatrix intended to give Mrs. Kirk a mere phantom legacy. The contention of the infant defendants inevitably leads to this, since, if Mrs. Hance made that will intending the debt to pass, only in case it was still a debt at her death, when she knew that it would no longer at that time be a debt, then she practically made use of a solemn instrument to deceive the friend in whose welfare she took so much interest. A careful inquiry, in light of all the surrounding circumstances, which have already been adverted to, forces the belief that the testatrix, though calling them debts, meant merely to designate the funds from

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which any moneys of which she knew would come to her, and she desired by her will to bequeath to Mrs. Kirk all her interest in the funds designated, which had not been disposed of anterior to her death. This bequest, it is submitted, merely amounts to an assignment of a fund, and what remained of that fund was to pass to Mrs. Kirk.

W. Cabell Bruce for the appellant, Littig.

There were six different sums of money received by Eliza G. Hance, or Mr. Littig as her executor, that were, in the shape of cash or the stocks purchased by Mr. Littig, on behalf of Eliza G. Hance, disposed of by the decree appealed from. 1. The \$1,610.38 deposited during the lifetime of Eliza G. Hance to the credit of her individual account at the National Marine Bank, on November 19, 1892, and which was her net one-half of the commissions allowed her and Franklin I. Hance, as the executors of Seth S. Hance, in the administration account passed by them in the Orphans' Court of Baltimore City. This sum was payable to her at the time of the making of her will on June 20, 1891. 2. The \$2,933.57 deposited in the same manner in the same bank on the same day, and which was Eliza G. Hance's one-third (erroneously capitalized in the administration account) of the net income of the estate of Seth S. Hance, collected during the course of administration, and her one-third of the interest on the bank deposits down to the time of the death of Franklin I. Hance. This sum was likewise payable to her at the time of the making of her will on June 20, 1891. 3. The \$3,900.56 deposited in the same manner in the same bank on January 17th, 1893, but reduced by the advances and taxes herein-before mentioned, and which was Eliza G. Hance's one-third of the income of the estate of Seth S. Hance, collected by her as his surviving executrix between January 29th, 1891, and December 29th, 1892. What proportion of this amount was due or collected at the time of the making of her will on June 20th, 1891, and what was collected afterwards, does

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not appear from the record. 4. The \$491.88 paid to Mr. Littig, as the executor of Eliza G. Hance, by the executors of Franklin I. Hance, after her death, and which was her one-third of the rents of the leasehold property of her husband. And two other small sums from her husband's estate.

The Court below held that the bequest to Mrs. Kirk embraced only indebtedness due at the time of the execution of the will of Eliza G. Hance, viz., June 20, 1891, and therefore, that even if there had been no calling in during the lifetime of the testatrix, the bequest would have carried, besides the \$491.88, only the \$1,610.38, the \$2,933.57, and such part of the \$3,900.56 as reduced by the advances and taxes, as became due before the date of the execution of the will. In other words, the Court held that the bequest spoke only as of the date of the making the will. It is submitted that this was error. "With regard to personal property, the rule has always been that a will speaks and takes effect from the death of the testator, and the same rule has long since been made, by statute, applicable to real estate." *Dalrymple v. Gamble et al.*, 68 Md. 528; *State, use of Dittman, admr., v. Robinson and Campbell*, 57 Md. 501.

Assuming that the bequest to Mrs. Kirk speaks as of the date of the death of the testatrix, this appellant contends that all three of the sums mentioned, the \$1,610.38, the \$2,933.57 and the \$3,900.56, as now reduced, are justly Mrs. Kirk's under the bequest, notwithstanding they were all transferred during her lifetime by herself, as the surviving executrix of Seth S. Hance, to herself individually. This contention is based upon two propositions: 1. As to these sums, no question of ademption properly arises in this case at all. With regard to them, it is true that the testatrix, in the bequest to Mrs. Kirk, uses language descriptive of debts, which, it is admitted, when bequeathed, *qua* debts are always deemed by being called in during the lifetime of the testator. But in no true sense were they debts; nor did their real character or essential legal qualities un-

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dergo any change by their being called such by the testatrix. In bequeathing them and the other sums derivable from the same sources to Mrs. Kirk, the testatrix intended nothing more than a testamentary assignment or relinquishment of her interest in her husband's estate. *Gelbach v. Shively*, 67 Md. 501. And if this be so, the bequest still attaches to the funds whether called in during her lifetime or not, as they are readily susceptible of identification, and her object was simply to assign the funds themselves, in such state as they might be at the time of her death, without regard to the sources from which they came, which was a mere incident of the gift, or matter of description. 2. Even if the \$1,910.38, \$2,933.57 and \$3,900.56, as reduced, were debts, properly speaking, the bequest thereof was not deemed by their being called in during the lifetime of the testatrix, because what the testatrix bequeathed was not the debts, *qua* debts, but their proceeds. Where a testator bequeaths not the debts itself, but its proceeds, the bequest is not lost, even though he collects the debt in his lifetime, but the bequest will follow the proceeds, so long as the proceeds of collection are susceptible of identification, and even though a part of the proceeds are invested. This distinction is well established. 13 *Am. & Eng. Ency. of Law*, p. 76, note; *Navey v. Vaunoy*, 6 Jones, ch. 188; *McNaughton v. McNaughton*, 34 N. Y. 205; *Smith v. Fitzgerald*, 3 Ves. & B. 5; *Clark v. Brown*, 2 Sm. & G. 529; 2 *Leading cases in Equity*, pt. II, pp. 673-4; *Dougherty v. Stillwell*, 1 Bradf. 307, 308.

Samuel D. Schmucker and George Whitelock, for the appellees.

A specific legacy is the bequest of a particular thing or money specified and distinguished from all others of the same kind, and if the specific legacy fail by reason of the failure of the specific fund, the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator. *England's case*, 53 Md. 468 and 469. And

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it is perfectly well settled that the legacy of a debt is a specific legacy. *2 Williams Executors* (1895), p. 440; *Kent v. Somervell*, 7 G. & J. 262; *Sparks v. Weedon*, 21 Md. 157, 158, 164; *Beach on Wills*, sec. 140; *Chase v. Lockerman*, 11 G. & J. 279.

The general rule is that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain in specie as described in the will. *2 Williams Executors* (1895), p. 632. It would seem, therefore, that the sums of \$1,610.38 and \$2,933.37 due to Mrs. Hance from the estate of her husband at the time of the making of her will for commissions and income included in his administration account, answered to the description of indebtedness in the gift to Mrs. Kirk, but that the latter's title thereto is not complete because the legacy was adeemed by the payment of the debt during the lifetime of the testatrix. An ademption is the extinction of a legacy in consequence of some act of the testator in his lifetime whereby at his death the subject of the bequest fails to correspond to the description thereof in the will. *Beach on Wills*, sec. 145. And if a specific bequest is made of a debt owing to a testator, and the debt is paid to him before his death, the collection of the debt is an act of the testator that will adeem the legacy whether the payment was voluntary or compulsory. *Smith's Appeal*, 103 Pa. St. 569; *Wyckhoff v. Perrine*, 37 N. J. Eq. 118-121; *2 Williams Executors* (1895), p. 635. Indeed, the intention to adeem will not be considered beyond the expressions in the will. *Ford v. Ford*, 25 N. H. 216, 217. And when the debt which is the subject of the gift is paid off, the legatee cannot, to maintain the legacy, trace the money into the hands of another party, merely because the testator has not spent it in his lifetime, and it does not, therefore, cease to be within the rule of ademption, as where the testator has the money on deposit in a bank. *Watson's case*, 11 Hare, 175. In Maryland, certainly, the relation of banker and depositor is merely that of debtor and creditor, and money deposited in a bank

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does not remain in specie in the banker's hands, nor does it continue to be the property of the depositor. *Horwitz v. Ellinger*, 31 Md. 503; *Hardy v. Chesapeake Bank*, 51 Md. 585. Although this reasoning seems hardly necessary in the present case, as the fund cannot, in fact, be identified, inasmuch as it was deposited in an account which had been running for some years, and stocks had been bought with it, and living and other expenses paid out of it, and it had not been kept separate from the rest of the estate of the testatrix, as was the case in *Clark v. Brown*, 2 Smale & Giff, 530, which was relied on by the appellants in the lower Court.

McSHERRY, J., delivered the opinion of the Court.

The will of Eliza G. Hance, dated June the twentieth, 1891, contains the following clause: "And whereas the estate of my late husband, Seth S. Hance, is indebted to me in a large sum of money for dividends, etc., to which I am entitled under the terms of his will, and also all moneys that may be due and owing to me from his estate and my late son, Franklin I. Hance, after the payment of the money legacies hereinbefore mentioned, I give and devise the same absolutely to my sister-in-law, Cassandra A. Kirk." What is the meaning of this clause; or what did the testatrix intend to dispose of by it? This is the question now before us.

As the decision of the case necessarily turns upon the meaning of the words used by the testatrix when viewed in connection with all the circumstances that surrounded her, it may not be amiss to quote at the threshold an observation made by LORD WENSLEYDALE, in *Grey v. Pearson*, 6 H. L. C. 108, to the effect "when the decision is * * * * * upon the meaning of words in instruments which differ so much from each other, and when the proper construction is so varied by the peculiar circumstances of each case, it seldom happens that the words of one will are a sure guide for the construction of words resembling them in another." To settled legal principles and established rules of construction

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applicable to all written instruments, rather than to mere verbal analogies or accidental resemblances of language, must resort be had in solving the question before us.

Now, it is a familiar and unvarying doctrine that the intention of the testator, as gathered from the four corners of the instrument, is to prevail, if there be apt words used to effectuate it, unless it contravenes some positive principle of law or be frustrated by some unbending rule of construction assigning an inflexible meaning to particular words. And to aid in showing, not what the testator meant apart from what his words express, but what the meaning of his words really is, the circumstances surrounding him at the time he executed his will, including an inquiry into the condition and the nature and extent of his property, may always be considered and weighed. For the purpose of ascertaining the testator's intention, as expressed in his words and not as an independent fact, "you may," as remarked by LORD JUSTICE JAMES, "place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will, to assist you in arriving at his intention." *Boyes v. Cook*, L. R. 14, Ch. D. 56. You may, in a word, surround yourself with the circumstances which surrounded him, and from that standpoint, when thus informed, you may, with more accuracy, interpret the words he has used, precisely as you may do in construing a written contract. *Nash v. Towne*, 5 Wall. 689; *Shore v. Wilson*, 9 Clark & Fin. 569.

Apart from the funds and money alluded to in the clause quoted from the will and apart from a few trifling and insignificant articles of household furniture disposed of by prior clauses of the same will, it is not shown that the testatrix possessed, at the time she made her will or at the date of her death, any other property whatever. The value of what she did have is approximately five thousand dollars. That she did not design to die intestate as to any of her property is a presumption which the law raises, from the mere fact of a will having been made. *State, use of Dittman*

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v. *Robinson & Campbell*, 57 Md. 500. And when a will has been executed it is the settled policy of the Courts that they will struggle against a partial intestacy, especially when resort must be had to a forced and unnatural construction of the words used to produce such an intestacy. *Booth v. Booth*, 4 Ves. 403; *Johnson v. Safe Deposit Co.*, 79 Md. 18.

When the will was executed the testatrix was a childless widow and was entitled from her husband's and her son's estates to the several sums of money which will be alluded to in a moment; and these constituted the bulk of her estate. Her son had died some months before the date of her will, leaving three children, to whom he bequeathed his entire property, valued at over two hundred thousand dollars. These three children of her deceased son were her only descendants, and they were fully and amply provided for by their father's will. Under her husband's will she was entitled to a life-estate in one-third of his property and the residue of that property was given absolutely to the son. Mrs. Kirk, the legatee claiming under Mrs. Hance's will, was the latter's sister-in-law, a widow herself, with seven children and in very destitute circumstances. Between the testatrix and this sister-in-law the most cordial and affectionate relations existed. Her grandchildren and Mrs. Kirk were nearest to her. The grandchildren were amply provided for; the sister-in-law was poor, and the testatrix's whole estate was small and of comparatively trifling value. The acquisition of the whole of it by the grandchildren would have been of slight consequence to them; the possession of it by the sister-in-law would be of great moment to her. This was all obviously known to the testatrix and was fully appreciated by her, and accordingly in her will she gave to the granddaughters some small articles of household furniture; then to other parties seventeen hundred dollars in pecuniary legacies, and then to Mrs. Kirk that which is described in the clause heretofore transcribed, and which in fact constituted the entire residuum of her property.

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Seth S. Hance, the husband of the testatrix, died in May, 1884. By his will, to which allusion has been made, he appointed his son executor and his widow executrix of his estate. They assumed the duties pertaining to that office. In his lifetime Seth S. Hance had been engaged in the manufacture of patent medicine, and after his death the business was continued by the son. During the course of the administration of Seth S. Hance's estate the executors deposited at interest in several banks various sums belonging to the estate, and aggregating something over twenty-five thousand dollars. Upon these sums, at the date of Mrs. Hance's will, the interest accrued amounted to over three thousand dollars, and to the one-third of this earned interest she was then entitled, as subsequently determined by a decree of Circuit Court No. 2 of Baltimore City, passed on November the eleventh, 1892, in a case then depending therein. Besides the foregoing income there had been collected by the executors over five thousand dollars of other income from the estate of Seth S. Hance, but it had been improperly capitalized, and not distributed as interest in the account stated by the executors in the Orphans' Court. By the same decree of November the eleventh, 1892, Mrs. Hance was awarded the one-third of this sum. It was due to her from her husband's estate at the date of her will. These two items make up the sum of twenty-nine hundred and thirty-three dollars and fifty-seven cents. By the same decree of November the eleventh she was directed to pay to herself, out of her husband's estate' the sum of sixteen hundred and ten dollars and thirty-eight cents for her share of the net commissions allowed to executors upon the assets of Seth S. Hance's estate. This sum was due to her when her will was executed. After the death of her son, and down to December the twenty-eighth, 1892; as surviving executrix, Mrs. Hance collected a large amount of income, her one-third of which was the sum of three thousand nine hundred dollars and fifty-six cents. This was a sum of money which became due and owing to her,

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not in the sense of an indebtedness, but as an interest in her husband's estate; but what proportion of it accrued to her after the date of her will and what proportion before, does not appear, and is not material. After Mrs. Hance's death there came to the hands of her executor the sum of seven hundred and eighty-six dollars and two cents, as her share of the proceeds of sale of the patent medicine business conducted by her son after the decease of her husband, and it is obviously this money to which she refers in her will as owing to her from her late son. There are two other items, one amounting to four hundred and ninety-one dollars and eighty-eight cents, which is not in controversy, and the second, amounting to forty-one dollars and seventy-seven cents, collected by Mrs. Hance's executor from the executors of her son, it being one-third of the income derived from her husband's estate, and which accrued up to the time of her death and long after the date of her will. The whole of the twenty-nine hundred and thirty-three dollars and fifty-seven cents of income, the whole of the sixteen hundred and ten dollars and thirty-eight cents of commissions, and part of the thirty-nine hundred dollars of income above referred to were undoubtedly the "sums of money" in which, as she described it, "the estate of" "her husband was indebted to her" "for dividends, etc.,," and to which she "was entitled under the terms of his will," at the time she executed and published her own will. But, under the decree of November the eleventh, 1892, passed in a proceeding involving the construction of her husband's will and affecting the distribution of his estate, she was ordered, as surviving executrix, to draw her check in her own favor individually for these sums of twenty-nine hundred and thirty-three dollars, and sixteen hundred and ten dollars, and by a supplementary order of January the thirteenth, 1893, she was authorized to retain for her own use the other sum of thirty-nine hundred dollars. Accordingly, on November the nineteenth, 1892, she deposited to her credit, in the National Marine Bank, two checks drawn on the National

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Bank of Commerce, the one for sixteen hundred and ten dollars and thirty-eight cents, which stated on its face that it was for the one-half of the net commissions allowed, the other for twenty-nine hundred and thirty-three dollars and fifty-seven cents, which stated in its face that it was for the one-third of the income. As credited to her on the books of the Marine Bank, the identity of these sums is preserved, for the entries expressly state that the one item is for one-half the commissions, and the other is for one-third of the income included in the administration account and collected from the bank deposits heretofore spoken of. On January the seventeenth, 1893, there is a deposit credited to her of thirty-nine hundred dollars and fifty-six cents, and this is clearly the same sum apportioned to her under the supplementary order of January the thirteenth, 1893. When these deposits were made, Mrs. Hance was indebted to the Marine Bank on overdrafts, and the payment of these latter, and the checking out of some other amounts, reduced the balance to her credit at the time of her death to about five thousand dollars.

The learned Judge of the Circuit Court of Baltimore City, by a decree from which these appeals are taken, held that the bequest to Cassandra A. Kirk was a specific and not a general legacy, "and was intended to embrace only indebtedness due at the time of the making of the will and remaining unpaid at the death of the testatrix, but did not embrace current income accruing after the date of the will to the testatrix as life-tenant of her husband's estate." It was further decreed that "the said specific legacy to Cassandra A. Kirk was, by the collection aforesaid, during the life of the testatrix, adeemed, except to the extent of the sum of four hundred and ninety-one dollars and eighty-eight cents collected by her executor after her death." The decree then proceeded to direct the executor of Eliza G. Hance to pay the pecuniary legacies, aggregating seventeen hundred dollars, and to pay to Mrs. Kirk the sum of four hundred and ninety-one dollars and eighty-

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eight cents above specified, and to pay the residue of the estate to the guardian of these three grandchildren. From this decree the executor of Eliza G. Hance, viz: John M. Littig, and the legatee, Cassandra A. Kirk, have both appealed.

A motion has been made to dismiss the appeal taken by the executor, but as this does not reach the merits of the case, we will defer its consideration till later on.

The outline of facts just given discloses what estate Mrs. Hance was possessed of at the time she executed her will, and how she acquired it. It shows further, that the bulk of it consisted of moneys to which she was entitled, when the will was made, but which were then locked up in the estates of her husband and her son. These sums of money were not, technically or strictly speaking, debts, nor were the estates of her husband and her son, in a literal sense, indebted to her, but these moneys were sums to which she was then and would thereafter become entitled from the two designated sources. They included dividends to which under the terms of her husband's will she was entitled, and commissions to which, as one of his executors, she was likewise entitled, but in no sense were they debts at all. "A debt is money due upon a contract, without reference to the question of the remedy for its collection." *Mayor, &c., of Balto. v. Gill*, 31 Md. 375. There must consequently be a creditor and a debtor as well as a sum due, and there must be a contract out of which the indebtedness arises, before there can be a debt. These characteristics are inseparable from a debt. A debt can no more exist without a debtor than without a sum due. There was no relation of debtor and creditor between Seth Hance's estate and his widow, nor between her son's estate and her. On the contrary, in the one instance, the relation that did exist was that of testator and legatee, involving unpaid income accruing after the testator's death and the distinct other relation of testator and executrix involving commissions ascertained upon the settlement of her husband's estate. In the other

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instance—that of the son's estate—there existed the relation of surviving partner as respects the patent medicine business. There were no other sums due to Mrs. Hance by either her husband's or her son's estate, than those arising out of the relations just mentioned, and obviously what was given by the will to Mrs. Kirk was not given as *specific debts* that were due to the testatrix *as debts*, but was a sum of money or sums of money to be subsequently realized from the particular sources specified.

Considered in the light of the circumstances that surrounded the testatrix, the correct reading of the disputed clause is manifestly this: "The large sums of money for dividends, &c., to which I am entitled under the terms of my husband's will, and also all moneys that may be due and owing to me from his estate and my late son, *after the payment of the money-legacies hereinbefore mentioned*, I give and devise absolutely to my sister-in-law, Cassandra A. Kirk." And this is a bequest of the moneys thus described, and is not a specific legacy of a debt. The words used are only descriptive of the situation of the money intended to be bequeathed, and they do not, in view of all the attendant circumstances, import a gift of specific debts *as debts*, because there were in fact no debts properly so called due to the testatrix from either of these estates. The fact that by way of recital or additional description she declares that "whereas the estate of my late husband * * * * is indebted to me," cannot alter this obvious meaning. As already stated, there was no indebtedness as such, due to her by her husband's or her son's estate, and an erroneous addition to the description of a thing which is given when the thing so given is otherwise sufficiently identified will not defeat the gift. *Falsa demonstratio non nocet.* Every application of this maxim implies that a mistake has occurred in the use of language. In all such cases the legal question is, conceding a mistake, is the intent clear upon the whole language employed? *Criss et al. v. Withers' Extras.*, 26 Md. 569. To illustrate: In the case

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of *Selwood v. Mildmay*, 3 Ves. Jr. 306 (which is designated a very strong case by C. J. TINDAL, in *Miller v. Travers et al.*, 8 Bing. 244), the testator devised to his wife part of his stock in the four per cent. annuities of the Bank of England, and it was shown by parol evidence that at the time he made his will he had no stock in the four per cent. annuities, but that he had had some which he had sold out, and of which he had invested the produce in long annuities, it was held that the bequest was in substance a bequest of stock, using the word as a denomination, not as the identical *corpus* of the stock ; and as none could be found to answer the description but the long annuities, it was decided that such stock should pass, rather than the will be altogether inoperative. And so in *Day v. Trig*, 1 P. Wms. 286, a devise of all the testator's freehold houses in Aldersgate street, when, in fact, he had no freehold, but had leasehold houses, was held to pass the latter, the word freehold being rejected ; the rule being that when any property described in a will is sufficiently ascertained by the description, it passes under the devise, although all the particulars stated in the will with reference to it may not be true. See also *Doe & Dunning v. Lord Cranstown*, 7 M. & Wels. 1 ; *Doe & Humphreys v. Roberts*, 5 B. & Ald. 407 ; *Andrews v. Pearson*, 68 Me. 19.

There is a broad distinction between the gift of a debt as *a debt* and the sum of money produced when the debt has been recovered and has ceased to be a debt. In the one instance the legacy is specific and the collection of the debt in the testator's lifetime will deem the legacy. On the other hand, the gift extends to and includes the fund in its altered state, because being a gift of the fund, the thing given will pass though it be not in the precise state it was when the will was executed. *Clark v. Brown*, 2 Smale & Gif. 524. The will speaks and takes effect from the death of the testator and not from its date. *Dalrymple v. Gamble et al.*, 68 Md. 528, and it carried whatever fund the testatrix was possessed of at her death, however invested, that answered

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the description in the will, and the description in the will included all moneys to which the testatrix was entitled from her husband's and her son's estates, whether collected and received by her in her lifetime or not.

If the interpretation we have placed upon the clause in question be not the correct one, it can only be erroneous on the ground that the legacy given was specific. If it was specific it has been deemed as decided by the Court below. If deemed there is a partial intestacy, and a partial intestacy resulting from a mere verbal construction, notwithstanding the intention of the testatrix not to die intestate at all is apparent and unmistakable. But beyond this, "Courts lean against construing a legacy to be specific, and have gone so far as to say that in no case ought a will to be so construed unless the language imperatively requires it, and accordingly, we find LORD ELDON saying, that according to well-settled rules of construction he was obliged to decide a legacy to be general, although according to his private opinion, the testator meant it to be specific." *Dryden, &c., v. Owings*, 49 Md. 364. This legacy cannot be treated as specific without defeating the obvious intention of the testatrix to make Mrs. Kirk, whom she knew to be in need, the chief recipient of her property; and without breaking through the rule just cited, though the language of the controverted clause does not imperatively require a construction leading to such results. There is another principle which forbids that the legacy be regarded as specific, and it is this: Where a fund is given subject to debts or subject to other legacies, the gift of the residue is not specific. *Harley v. Moon*, 1 Drewry & Smale, 623; *Baker v. Farmer*, L. R. 3 Ch. Ap. 537. The legacy given to Mrs. Kirk is that part of the described funds which remains after the prior pecuniary legacies amounting to seventeen hundred dollars have been first paid, and the clause is in consequence a residuary one as to all the moneys referred to in it.

We hold, then, that all the moneys which the testatrix had at the time of her death, which moneys were derived from

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the sources mentioned in her will, that is to say, from her husband's and her son's estates, and which remain after paying the prior pecuniary legacies, passed to Mrs. Kirk, no matter how held or invested at the date of Mrs. Hance's decease. So much of the decree appealed from as denied her these funds and which held the legacy to be specific and partially adeemed, will be reversed; and the residue, awarding to the granddaughters of the testatrix and to the mother of the granddaughters specific legacies of personal property and to the pecuniary legatees the pecuniary legacies and to Mrs. Kirk the sum of four hundred and ninety-one dollars and eighty-eight cents, heretofore referred to, will be affirmed.

The motion to dismiss the appeal taken by the executor must be overruled. It is not an appeal by one who has no interest in the subject-matter of the controversy as in instances where the appellant is a mere custodian of a fund. But the bill was filed by him for a construction of his testatrix's will, and if he had the right to invoke the aid of the lower Court in ascertaining the true meaning of that will, he certainly had the right to bring the record into this Court by appeal for a review of that construction, if he conceived that by the decree below the design and purposes of the testatrix were defeated. Such appeals have been heretofore entertained without question.

Motion to dismiss the executor's appeal overruled. Decree affirmed in part and reversed in part, the costs to be paid out of the estate, and the cause is remanded that another decree in conformity to this opinion may be passed.

(Decided June 19th, 1895.)

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Syllabus.

BOSTON FEAR *vs.* J. KEMP BARTLETT, JR., TRUSTEE OF THE VALLEY LAND AND IMPROVEMENT COMPANY.

Corporations—Subscription to Capital Stock obtained by Fraud—Right of Subscriber to avoid the same before the Insolvency of the Company—Ratification of Subscription—Contract to be Performed in another State.

If a party is induced to subscribe for shares of the stock of a corporation upon the faith of certain representations contained in a prospectus issued by the company, which representations are false, and within a reasonable time after the discovery of the fraud, and before the insolvency of the company, he notifies the company that he repudiates the contract, these facts constitute a valid defence to an action to recover the subscription.

The subscriber to the stock is released in such case because he has exercised his right to avoid a contract obtained by fraud. The subsequent insolvency of the corporation does not make him liable on such a contract, and the equities of the creditors of the company are not superior to his own.

Quaere: Whether the subscriber could repudiate a subscription obtained by the fraud of the corporation after its insolvency, when he had no opportunity of becoming aware of the fraud prior thereto.

The doctrine that unpaid subscriptions to the capital stock of a corporation are a trust fund for the benefit of its creditors, does not apply so as to prevent a defrauded shareholder from rescinding his contract before proceedings in insolvency have been instituted against the company, or what is regarded in law as an act of insolvency committed.

Defendant's contract of subscription was made in July, 1890. Two months thereafter, upon discovering the alleged fraud, he repudiated the subscription. A year afterwards defendant paid to a director of the company one thousand dollars, "in order to save what he had already paid," but at the same time declared that he did not intend to make any further payment on his subscription. Defendant was unable to read or write. *Held*, that under these circumstances, such payment could not be treated as amounting to a ratification of the contract of subscription.

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Appeal from the Court of Common Pleas. At the trial the plaintiff offered the following prayers:

Plaintiff's 1st Prayer.—The plaintiff prays the Court to declare that upon the testimony of the defendant himself, there was no such repudiation of the contract of the defendant as a stockholder of the Valley Land and Improvement Company as to discharge him from liabilities as such stockholder in this suit. (Granted.)

Plaintiff's 2nd Prayer.—The plaintiff prays the Court to declare that the defendant having admitted that he signed the subscription contract offered in evidence, for fifty shares of the capital stock of the Valley Land and Improvement Company, of the par value of one hundred dollars each, and that he paid and received the certificate of payment of two thousand dollars on account of said shares, then the defendant became a stockholder of said company, and the company had his authority to register his name upon its books as a stockholder of said shares of its capital stock; and it being admitted that while the defendant's name was so registered the company incurred a large amount of indebtedness, which yet remains due and unpaid, and which it is unable to pay without recourse to the liability of its stockholders, then, by force of the unwritten law of Virginia, as shown by the decisions of the Supreme Court of Appeals of Virginia offered in evidence, and by force of the decrees of the Circuit Court for Page County and the deed of trust offered in evidence, the plaintiff is entitled to recover in this suit, notwithstanding the Court shall further find that after the company incurred such indebtedness, which still remains unpaid, the defendant attempted to repudiate his subscription, as testified to by him. (Granted.)

Plaintiff's 3rd Prayer.—The plaintiff prays the Court to declare that the defendant having admitted that he signed the subscription contract offered in evidence for fifty shares of the capital stock of the Valley Land and Improvement Company of the par value of one hundred dollars each, and

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that he paid and received the certificate of the payment of two thousand dollars on account of said shares, then the defendant became a stockholder of said company, and the company had his authority to register his name upon its books as a stockholder of said shares of its capital stock ; and it being admitted that while the defendant's name was so registered, the company incurred a large amount of indebtedness which yet remains due and unpaid, and which it is unable to pay without recourse to the liability of its stockholders, then by force of the decrees of the Circuit Court for Page County, and the deed of trust offered in evidence, the plaintiff is entitled to recover in this suit, notwithstanding the Court shall further find that after the company incurred said indebtedness, which still remains unpaid, the defendant attempted to repudiate his subscription, as testified to by him. (Granted.)

And the defendant offered the three following prayers :

Defendant's 1st Prayer.—If the Court finds from the evidence that the defendant contracted with the Valley Land and Improvement Company to purchase fifty shares of the capital stock for the sum of five thousand dollars, and paid two thousand dollars on account thereof on the day of said purchase, on July 11th, 1890, that said contract was made with J. D. Wheeler, the company's agent, and that the defendant was induced to make said contract upon the representations contained in the printed prospectus of the said company, which has been offered in evidence, and said company delivered to the defendant, through said agent, the receipt for the two thousand dollars so paid, signed by said Wheeler, which has also been offered in evidence, is the same, or a copy of the same exhibited by the said Wheeler to the defendant at the time of said contract of sale and of said stock; and if the Court shall further find that said prospectus contained fraudulent and material misrepresentations of facts which were calculated to induce subscriptions to stock, and that the defendant, by reason of said false statements, was induced to subscribe to the said

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fifty shares of stock ; and if the Court shall further find that in the fall of 1890, and subsequent to the public sale of lots in September, 1890, and while the company was still conducting business through its officers, the defendant notified the said Wheeler, the company's agent, and also notified Levi Z. Condon, one of the directors of the said company, prior to January 1st, 1891, that he had heard that the said company was a swindle and fraud, and that he would have nothing more to do with it, and would pay no more money on his stock subscriptions; and shall further find that he did so because he learned that the company did not own the lands represented to him that it owned, and of other misrepresentations, and that said notice was given within a reasonable time after he had learned of said misrepresentations ; and further find that the defendant was and is now a citizen of Maryland, then the verdict must be for the defendant. (Rejected.)

Defendant's 2nd Prayer.—If the Court shall find that the prospectus offered in evidence had been exhibited by the agent or agents of the Valley Land and Improvement Company to the defendant, or that the said statements offered in evidence as to the ownership of the caves and mineral property, &c., as testified to by the defendant, before any contract was entered into between said company and him were made with a view to induce him to take the stock mentioned in the evidence, and that said prospectus formed part of the contract with reference to said stock, between said company and the defendant, and that when said contract was made said company did not own and control the Luray Inn and Caverns, or had not acquired about twenty-five hundred acres of the choicest land for building sites and manufacturing purposes, or did not own or control about eight thousand acres of the best mineral property in Virginia, consisting of iron, manganese and other valuable minerals, or shall find that it is untrue to any material extent that the books of subscription of sale of said stock

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were hardly opened when one hundred thousand dollars were subscribed, and that the defendant heard prior and after the lot sale, circumstances putting him on enquiry as to said misrepresentations contained in said prospectus, in any of the above-mentioned particulars, he called on J. D. Wheeler, the company's agent, and notified him that he would no longer be bound by said contract, or make further payments thereon, and gave Levi Z. Condon, as agent and director of said company, such a notice before January 6th, 1891; and shall further find that when such notice was given, the said company was a going concern, engaged in the conduct of its business by its own officers, and that the defendant did give said notice within reasonable time after discovering said misrepresentations, and also that the defendant was then and still is a citizen of Maryland, then the verdict ought to be for the defendant. (Rejected.)

Defendant's 3rd Prayer.—The defendant prays the Court to exclude from this case all evidence tending to show what is the unwritten or written law of the State of Virginia as to the rights of subscribers to the capital stock of its corporations to repudiate said subscription, because the same is not applicable to this case. (Rejected.)

The Court below (DOBLER, J.), before whom the case was tried by agreement without a jury, granted the plaintiff's prayers and rejected the defendant's prayers, and from the judgment in favor of the plaintiff for \$1,650, the defendant appealed.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE and BOYD, JJ.

R. B. Tippett (with whom was Jas. E. Tippett on the brief), for the appellant.

John P. Poe, Attorney-General, and *Joseph C. France* (with whom was *Charles Marshall* on the brief), for the appellee.

Conceding for the argument that the defendant was misled by a material, untrue statement in the prospectus, and that

in due time he disaffirmed the contract, then it is clear that his defence would be a good one in any suit brought by the *company*. But the company having become insolvent, and the demand for payment being made by a trustee appointed to collect the unpaid subscriptions for the purpose of paying therewith the company's debts—whose equity is stronger, that of the innocent creditor, or that of the defrauded subscriber? A corporation can have nothing but what it acquired through its stock subscriptions; a creditor can therefore look to nothing but these. Suppose he actually examines the company's stock ledger, and finding that subscribers, of whose solvency he is sure, still owe the company, lends his money in good faith before such subscribers have disaffirmed—who has the stronger right? A fraudulent contract is only voidable; when repudiated it becomes void, not from the date of its making, but from the date of its disaffirmance. Following this principle, the decisions are as follows:

In England, where and because a system of publicly registering the names of stockholders prevails, a defrauded stockholder must institute public proceedings for the purpose of having his name removed from the list, if the company refuses so to remove upon demand. In this country there is no such system and no such requirement. A repudiation distinctly made to the company or to any authorized agent ends the matter, if the rights of third parties are not involved. In England, any one whose name has not been removed from the registry before the time of winding up, or even before insolvency, must contribute to pay creditors, even if defrauded into his subscription. But it is a mistake to conclude that this rule is based upon the requirements of the public registry system; the rule was laid down in the often quoted case of *Oakes v. Turquand*, L. R. 2 H. L. 325, but in the latter case of *Stone v. The City and County Bank*, 3 C. P. Division, 283; the Court (BRAMWELL, L. J.), in commenting on *Oakes v. Turquand*, says that a stockholder's liability arises, not from estoppel, but "depends upon a prin-

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ciple similar to that upon which the decision in *Kingsford v. Merry* proceeded. It was there held that if the owner of goods sells them, owing to a fraudulent representation, and before he discovers the fraud another person acquires some claim to them, he cannot afterward rescind the contract."

Now, while we have in this country no registry system, nevertheless, there are two rules growing out of the decisions, which, in a measure, supply its place. These are, (1st), a creditor is conclusively presumed to give credit to a corporation upon the faith of its stock subscriptions, and (2d), the creditor is conclusively presumed to know in reference to the names of the subscribers and the amounts due by them, that which an examination of the company's books at the time of giving the credit would disclose. *Handley v. Stutz*, 139 U. S. 509. "Whatever may be the law between the delinquent subscriber and the corporation, the rights and equities of corporate creditors are not to be thereby affected." *Rider v. Morrison*, 54 Md. 429; *Crawford v. Rohrer*, 59 Md. 604. "A defrauded stockholder must notify the company and claim rescission before they incur liabilities on the faith of his contract." *Cunningham v. Edgefield R. R. Co.* 2 Head (Tenn.) 23; *Chubb v. Upton*, 95 U. S. 665. "One who has been induced to subscribe for corporate stock by fraudulent representations, cannot recover the amount paid until the claims of creditors are satisfied," "although the fraud was not discovered until after insolvency." *Turner v. Grangers' Co.*, 65 Ga. 649. See also *Upton v. Hansbro*, 3 Bissell, C. C. 425; *Chubb v. Upton*, 95 U. S. 665; *Howard v. Glenn*, 11 S. E. R. 610; *McDermott v. Harris*, 9 N. Y. 184; *Weisiger v. Richmond Ice Co.* (Va., Nov., 1894).

ROBINSON, C. J., delivered the opinion of the Court.

The plaintiff is the Trustee of the Valley Land and Improvement Company, chartered by the State of Virginia, and this is a suit to enforce the payment of the defendant's subscription to the capital stock of the company. The de-

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fence is that the defendant was induced to become a subscriber on the faith of certain representations set forth in a *prospectus issued by the company*; that these representations were false and fraudulent, and that the defendant, as soon as he became or could by reasonable diligence become aware of the fraud, and before the insolvency of the company, repudiated his contract of subscription and so notified the company.

The defence is substantially the same as that relied on in *Bartlett, Trustee, v. Savage*, 78 Md. 561, in a suit by the present plaintiff against the defendant in that case to recover his subscription to the stock of the same company. And in that case we said that if the defendant was induced to become a shareholder on the faith of certain representations contained in a prospectus issued by the company, and that these representations were false, and that within a reasonable time after the discovery of the fraud, and before the insolvency of the company, he repudiated his contract of subscription and so notified the company, these facts, if found by the jury, constituted a valid defense to the action.

The counsel for the appellee did not seem to think we had gone so far in that case, and in view of the fact that there are a number of other suits in the Court below involving the same defence, the question has again been fully argued and fully considered by us; and we see no reason to modify or qualify in the least the judgment in the Savage case. We cannot agree that it is in any manner in conflict with what is known as *the trust fund doctrine*, now recognized in this country. This doctrine, it has been said, was first announced in *Wood's case*, 3 Mason, 308, where the stockholders of a bank divided among themselves two-thirds of its capital stock, without leaving sufficient funds to pay its creditors, and MR. JUSTICE STORY held, and justly held, that the property of the bank must first be applied to the payment of its creditors, before there could be any distribution of its assets among the stockholders. And the most emphatic enunciation of the doctrine is to be found in

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the opinion of MR. JUSTICE MILLER, in *Sawyer v. Hoag*, 17 Wallace, 610, where a stockholder of an insurance company having given his note for his subscription to its capital stock, after the insolvency of the company and with full knowledge of its insolvency bought up claims against the company for one-third their face value, and then set up these claims as a set-off to his unpaid subscription.

But whatever may have been the origin of the doctrine, it means and can only mean, that when a corporation has been lawfully dissolved or has become insolvent, its entire property, including unpaid subscriptions to its capital stock, becomes a trust fund for the payment of its debts, and that creditors are entitled in equity to have their debts paid out of the assets of the company before there can be any distribution among the stockholders. *Fogg v. Blair*, 133 U. S. 534; *Railroad Co. v. Ham*. 114 U. S. 587; *Brandt v. Ehlen*, 59 Md. 1. And no one can question the justice and sound sense of the doctrine as thus understood. But it is only when the company has been dissolved or has become insolvent that this equitable doctrine arises. So long as the company is a going concern, having the possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals. And such being the case, if one is induced to become a subscriber to its capital stock by the fraud of the company and within a reasonable time after the discovery of the fraud, there being no laches on his part in discovering the fraud, repudiates his subscription, and this too before the insolvency of the company, under such circumstances he is, according to the settled law of this country, relieved of all liability on account of his subscription. He is relieved because he has the right to avoid a fraudulent contract, and because he has exercised this right. The subsequent insolvency of the company can upon no principle make him liable on a fraudulent contract which he has thus repudiated. And under such circumstances we cannot agree that the equities of the creditor are superior to those of the

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defrauded shareholder. Whether the subscriber could repudiate his subscription obtained by the fraud of the company after its insolvency, when he had no opportunity of becoming aware of the fraud before the insolvency, is a question in regard to which we are not to be understood as expressing any opinion. For the authorities in support of the views we have expressed, we may refer to *Savage's case*, 78 Md. 561.

And even in England, where the Companies Act of 1862, provides for the appointment of a public officer, whose duty it is to register the name, the capital stock, together with a statement as to the object and purposes of every company or corporation, with the names, addresses and number of shares taken by each subscriber, and the amount paid on each share, which register is open to the inspection of all persons, and which further provides, that every subscriber whose name appears upon the register shall, upon the winding up of the company, contribute to the payment of its debts, even under this Act it is now well-settled that a shareholder, whose subscription was obtained by fraud, may rescind the contract before the insolvency of the company. *Reese River Mining Company v. Smith*, L. R. 4, H. L. 64.

And when we speak of the right of the defrauded shareholder to rescind his contract before the insolvency of the company, we mean before proceedings in insolvency voluntary or involuntary have been instituted, or some act done that in law is regarded as an act of insolvency, for until then the trust fund doctrine relied on by the appellee has no application. *Graham v. Railroad Company*, 102 U. S. 148.

It follows from what we have said there was error in granting the second and third prayers of the plaintiff and in refusing to grant the defendant's second and third prayers. And there was error also in granting the plaintiff's first prayer, that upon the testimony of the defendant himself there was no such repudiation of his contract as to discharge him from liability. We agree that it was incumbent on the defendant to repudiate his contract within a reason-

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able time after the discovery of the fraud, and we agree, too, it must be a real and not a pretended repudiation, and we agree, too, that what amounts to a repudiation must largely depend upon the facts and circumstances of each particular case. Now, in this case, the defendant's subscription was made in July, 1890, and there is proof tending to show that early in September of the same year, two months after the subscription, upon discovering the fraud alleged to have been practised upon him, he at once repudiated his contract of subscription.

Now it appears that in September of the next year Mr. Condon, one of the directors of the company, and who had been somewhat instrumental in getting the defendant to subscribe for the stock in question, called on the defendant and told him there was more trouble at Luray and that he wanted to get ten thousand dollars to save the property of the company, and that he had paid five thousand dollars in cash on account of his stock, and wanted to try and save what he had paid. To this the defendant replied: "I will never give another dollar towards that subscription to the stock." After some further conversation the defendant said he was willing to give a thousand dollars to save what he had already paid on his subscription, and thereupon gave to Condon his cheque for that amount. But all through his testimony the defendant insisted that the amount thus paid by him was contributed solely for the purpose of saving the two thousand dollars paid by him at the time of his subscription, and was never meant or intended as a further payment on account of such subscription. The defendant is, it appears, unable to read or write, and it would be unfair, under all these circumstances, to say that the thousand dollars thus paid by him is to be treated as amounting in law to an affirmation of his subscription, especially in view of his declarations made at the time it was paid that he never would pay another dollar on account of his subscription.

In dealing with the defendant's subscription, we have

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treated it as a Virginia contract. The company was chartered by that State, with its office and place of business in that State, and although the subscription was made in this State, the contract was to be performed in Virginia. And this being so, the rights and liabilities of the parties under it are to be determined by the law of that State. And what we have said as to the right of the defendant to repudiate his subscription on the ground that it was procured through the fraud of the company, is strictly in accord with decision of the Court of Appeals of that State in *Weisiger and others v. Richmond Ice Machine Company*, 90 Va. 795.

Judgment reversed and new trial awarded.

(Decided June 19th, 1895.)

MASON, CHAPIN AND COMPANY *vs.* THE UNION MILLS PAPER MANUFACTURING COMPANY.

Limitations—Code, Art. 57, sec. 5—Absence from the State of Defendant—Attachment suit by Non-resident against Non-resident.

A non-resident defendant who voluntarily appears in an attachment suit cannot rely upon the Statute of Limitations, although the plaintiff is also a non-resident, unless the defendant has been within this State for the statutory period after the cause of action accrued.

A resident of another State has the same right to maintain an action in the Courts of this State that is possessed by a resident of this State, and if the suit be against a non-resident debtor, the defendant has no greater right to plead limitations against him than he has when the plaintiff is a resident of this State.

Where both plaintiff and defendant are non-residents and the cause of action sued on is a contract made and to be performed in another State, the plaintiff is entitled to the benefit of Code, Art. 57, sec. 5, which provides that if a defendant is absent from the State when the cause of action accrues, he shall not be entitled to rely upon limitations if the plaintiff shall commence the action within the statutory period after defendant's presence in this State.

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Argument of Counsel.

Appeal from the Superior Court of Baltimore City. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

William Reynolds for the appellants.

The universal construction put upon similar statutes in other States is that limitations do not begin to run until there may be found within the jurisdiction of the forum whose statute is pleaded a person capable of being sued. *Hysinger v. Baltzell*, 3 G. & J. 161; *State, use of Stevenson, v. Reigert*, 1 Gill, 1, 32; *Kirkland v. Krebs*, 34 Md. 97; *Wood on Limitations*, §§ 224 to 248. In the case of *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210, it was held that a foreign corporation sued in New York could not avail itself of the Statute of Limitations there, which provided that "if at the time the cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the time before limited after the return of such person into the State." See also *Wood on Limitations*, § 250, and cases there cited; also, recent case of *Larson v. Aultman & Taylor Co.*, 86 Wisc. 281; 39 Am. St. Rep. 893.

Under the Massachusetts statute, which provides that, "if at the time when a cause of action accrues against a person he is out of the Commonwealth, the action may be commenced within the time herein limited therefor after he comes into the Commonwealth," non-resident defendants sued by non-resident plaintiffs upon foreign contracts were held not entitled to the benefit of the statute in the following cases: *Bulger v. Roche*, 11 Pick. 36-39; *Getz v. Voelinger*, 99 Mass. 504; *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666, So in New York; *Ruggles v. Keeler*, 3 Johns. 263; 3 Am. Dec. 482; *Power v. Hathaway*, 43 Barb. 214.

Geo. Dobbin Penniman (with whom were *John K. Cowen* and *E. J. D. Cross* on the brief), for the appellee.

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FOWLER, J., delivered the opinion of the Court.

The question presented by this appeal relates to the construction of section 5 of Article 57 of the Code, title, "Limitations of Actions." Both parties are non-residents of this State, the defendant being a Pennsylvania corporation, and the plaintiffs are citizens of and doing business in the State of Rhode Island, under the name of Mason, Chapin and Company. The plaintiffs sued out of the Superior Court of Baltimore City, on the 7th February, 1894, a foreign attachment against the defendant, the cause of action being a breach of contract by the latter. This attachment was laid in the hands of the Baltimore and Ohio Railroad Company as garnishee, and the defendant corporation voluntarily appeared in the short note case and filed four pleas, upon three of which issue was joined, and to the fourth, which was the plea of limitations, the plaintiffs replied "that the said defendant was, at the time said cause of action accrued to the plaintiffs, absent from the State of Maryland, to-wit, in the State of Pennsylvania ; and thereafter was and continued to be and remained absent from this State up to within three years before bringing this suit." To this replication the defendant rejoined : "That the alleged cause of action accrued more than three years before the institution of this suit outside of the State of Maryland, and at the time of the accruing of said cause of action, both the plaintiff and defendant were non-residents of the State of Maryland and have never ceased to be non-residents, and said contract, on which this suit was instituted, was not made in this State, nor was any part of it to be performed in this State." The plaintiffs demurred to this rejoinder, and the Court below overruled the demurrer and gave judgment therein in favor of the defendant. From this judgment the plaintiffs have appealed.

The precise question is whether section 5 of Art. 57 of the Code applies to cases where both plaintiff and defendant are non-residents, and where the cause of action accrued outside of this State, and the contract sued on is a foreign contract.

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On the part of the plaintiffs it is contended that they have the same rights and occupy the same position as to the right to rely upon the provisions of our Code relative to limitations of actions that any resident of this State has, and that if a citizen of Maryland could not be successfully met by a plea of the statute by a foreign debtor, who is a resident of Pennsylvania, no more can such a plea be so set up against them. On the other hand, the defendant contends that the provisions of section 5 of Article 57 were made for and relate alone to debtors who are citizens of Maryland, and that a non-resident creditor who elects to bring a non-resident debtor into the Courts of Maryland in order to recover on a foreign contract, cannot avoid a plea of limitations by pleading the absence out of the State of such non-resident, in the terms of said section 5.

It will be observed that the validity of the replication of the plaintiff must depend upon the construction placed on section 5 of Art. 57. That section provides that "if any person liable to any action shall be absent out of the State at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained, if the person who has the cause of action shall commence the same after the presence in this State of the person liable thereto within the times herein limited." This language is certainly broad enough to include within its terms the defendant. It could not be much broader than it seems to be made by the words, "any person liable to any action." But comprehensive and all-embracing as it may seem to be, yet the language used in the statute must be construed and taken in the sense in which it appears to be used by the Legislature. The defendant suggests that an investigation or historical study of the origin and growth of the statute will show that its contention is the proper one, but after a careful examination of the old statutes, the original Statute of 21 James, 1, chapter 16, and 4 and 5 Anne, chapter 16, section 19, as well as the several statutes adopted by this State, all of which are based upon and in many re-

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spects similar to or modifications of the provisions of the old English statutes just referred to, we have arrived at a different conclusion.

In the Statute of James there was a provision in favor of "any person or persons" "beyond the seas," and the same provision appeared on our own statute until 1818, when the Act of that year, ch. 216, repealed it. It is true that the words "any person," &c., "beyond the sea," both in the Statute of James and our old statute, related to persons who were entitled to sue, but there was a similar provision in regard to defendants to be found in 4 and 5 Anne, ch. 16, sec. 19, by which it is provided that the statute should not run in their favor during their absence from the realm. And so, the words in section 5 of Art. 57, Code, relate to absent debtors, and the whole section is doubtless a modification of section 19 of the Statute of Anne. If these words, or similar ones, have been uniformly held, when used in the English Statutes of Limitations, from which ours are derived, to include both residents and non-residents, subjects and foreigners alike, then a like construction should be given to them, or similar words, when they appear in our statutes. In *Angel on Limitations*, sec. 21, the correct rule is laid down for construing these statutes. He says, in speaking of the Statute of James I, as modified by that of 4 and 5 Anne, "where any difference appears between the provisions of that statute in respect to personal actions and those of American Statutes of Limitations, it will be seen to be more in words than in substance, the end of one and all of them being one and the same." * * * * "And the mere change of phraseology in the revision of the statute before in force will not work an alteration in the law previously declared, unless it undisputedly appears that such was the intention of the Legislature," (see authorities cited in note.) In the case of *Strithorst v. Gracme*, 2 W. Bl. 723, which was an action of assumpsit, the defendant pleaded non-assumpsit and limitations. The plaintiff, who was a foreigner, replied that he had been beyond seas, &c., in Germany and

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so remained, &c. Counsel argued that the replication was bad, because if the law stood so, foreigners who reside always out of England would have the same or greater advantage than natives, and that the exception in the statute was meant for Englishmen who occasionally go beyond seas. But WILMOT, LORD C. J., said, "The exception in the statute is general, and therefore there must be judgment for plaintiff." This case is also reported in 3 Wilson, 145, and the opinion of the Chief Justice is there given more fully to the same effect. Also *Le Veux v. Berkley*, 5 Queen Bench, 836, which was tried before Lord Denman. And in the later case of *Lafoude v. Rud-dock*, 24 E. L. & Eq. 239, it was again contended that the proviso of section 7 of Stat. 21, James 1, relating to creditors "beyond the seas," could not apply to foreigners coming to England for the first time. JERVIS, C. J., again applied the liberal construction and said: "The proviso in favor of persons under disabilities in the Statute 21 James, ch. 16, applies as well to foreigners who have never been in this country, as to parties residing abroad at the time of the accruing of the cause of action, and returning afterwards to England." As we have seen, this same exception in favor of absent creditors was, until 1818, a part of our statute, and it was then repealed, because it was not considered fair, as suggested also in the old English cases we have cited, that citizens of other States and subjects of foreign countries should have greater advantages than our own citizens. And that this was the object intended by the repeal of the proviso in favor of absent creditors, is evident from what was said by ARCHER, J., in delivering the opinion of the Court of Appeals in the case of *Frey v. Kirk*, 4 G. & J. 521. "The unlimited latitude," he said, "given to persons beyond seas was considered by the Legislature as unreasonable, and it could constitute no actual grievance or just cause of complaint if they were reduced to the same standard as our own citizens." And again he says in the same case, that the construction the Court had placed on this

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same Act, was such as put all suitors, foreign and domestic, upon the same footing. See also *Pancoast, Lessee, v. Addison*, 1 H. & J. 350. It is apparent, therefore, that the saving or exception in favor of creditors has always in England, and in Maryland also, as long as it was a part of our law, been held to apply to both foreign and domestic creditors.

And if that be so, why should not the like provision in section 5 of Art. 57 have the same liberal construction? In England, under the Statute of 4 and 5 Anne, ch. 16, sec. 19, a foreign defendant could not plead the Statute of Limitations unless he had returned and been in England during the statutory period of limitation. *Forbes v. Smith*, 11 Exch. 161; *Fannin v. Anderson*, 7 Queen Bench, 811. And it has been uniformly held that the words "beyond the seas" is equivalent to "out of the State," "out of the jurisdiction." It was so held by this Court in *Maurice & Worden*, 52 Md. 291, and, therefore, if section 5 should be read as construed in that case, it would read as follows: "If any person, &c., shall be out of the State, beyond seas or out of the jurisdiction of the State" at the time the action accrues, &c., he shall have no benefit, &c. So read, section 5 would be identical with section 19 of Statute 4 and 5 Anne, ch. 16, which has always been held in England to include both residents and non-residents. *Fannin v. Anderson*, 7 Queen Bench, 811; *Towns v. Mead*, 16 C. B. 123; *Forbes v. Smith*, *supra*. Then, according to the terms of this section thus read, a citizen of Pennsylvania may be sued in our Courts, and it is conceded that, as against one of our citizens, a citizen of Pennsylvania cannot successfully plead the statute when sued here, if the former shall commence his action after the presence here of the latter within the statutory period, for it was so held in *Hysinger v. Baltzell*, 3 G. & J. 158. In *White v. White*, 1 Md. Ch. Dec. 57, it was held that the circumstance of the defendant in that case, being a non-resident, did not deprive him of the benefit of the Statute of Limitations of Maryland, because it was clearly shown that

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he had been in Baltimore more than three years before the action was commenced. And, of course, if he had not been here during the statutory period, he could not have relied upon limitations as a defence.

It would also seem to be clear that the plaintiffs, who are citizens of another State, have the same right to sue here that a citizen of this State has, and it is difficult to understand upon what principle of justice or fairness the non-resident debtor should be allowed to plead limitations against a non-resident creditor, and not against one of our own citizens. All should be on the same footing. *Frey v. Kirk, supra.* And this would accord not only with justice, but would seem to be giving to non-residents nothing more than they have a right to demand. For it would not do to say that our citizens and citizens of other States would enjoy the same rights and privileges here, when, under our law, the latter would be absolutely barred from recovery by a plea of limitations, while it would not avail against the former. *Paine v. Drew, 44 N. H. 314.* And inasmuch as the right to set up limitations as a defence has no existence except by virtue of statute, we should not allow it to prevail any more in the one case than in the other, unless it can be clearly shown that there is some statutory provision requiring such a distinction to be made.

It was urged that the course of the plaintiffs is somewhat inconsistent, in that they seek to avoid the effect of defendant's plea, because of the non-residence of the latter while the very action by which the defendant was forced into a Maryland Court is founded upon the same fact. While it is true the attachment proceedings were based on the non-residence of defendant, yet this is another case, in which, as the plaintiffs contend, the question of residence or non-residence is not involved, but only the question of the absence or presence in this State of the defendant, without regard to residence. Nor is it correct to say that the defendant was compelled to appear to this action. On the contrary, its appearance was entirely voluntary. *Fairfax Forrest Co. v.*

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Chambers, 75 Md. 604, &c. Such appearance was not even necessary to enable it to plead limitations or make any other defences, for the same defences which could have been made in this case would have been as well made on its behalf by the garnishee in the attachment case without any appearance on the part of the defendant in this case. *Poe Prac.*, sections 540 and 543. But there does seem to be some inconsistency in the position assumed by the defendant. Because it is a non-resident, it claims the benefit of that part of the Statute of Limitations which is in its favor and denies for the same reason that section 5, which is not in its favor, has any application whatever to it. It would seem but fair that our statute should apply altogether or not all to the defendant. If altogether, the rejoinder of the defendant was bad and the replication of the plaintiff was good, and if not at all, the defendant's plea was bad, and in either case the judgment on the demurrer should have been against the defendant.

We may now briefly consider another question raised by the demurrer, namely, the cause of action having accrued and the contract having been made outside the State, does such contract constitute such a cause of action as is contemplated by section 5 of Art. 57. It was contended by the defendant that foreign contracts are not contemplated by this section, but that it relates only to contracts made in this State and to be performed here. But we think such a construction would be strained, and it was said by JERVIS, C. J., in *Lafonde v. Ruddock*, *supra*, "the rejoinder now proposed is that the plaintiff is a Frenchman domiciled in France, and that the cause of action accrued there, so as to negative inferentially that the plaintiff returned to this country within the meaning of the proviso." "It seems to me," he continued, "that is seeking to put too strict a construction upon this Statute," and it was held that "*the mere circumstance of the cause of action accruing in France, and the plaintiff being a domiciled Frenchman*," was no answer to the replication that at the time the cause of action accrued

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the plaintiff was beyond seas, and had commenced his action within the period limited, next after his return, &c. Nor is there anything in the language of the section under consideration which would seem to compel us to adopt the narrow construction suggested by the defendant. In *Fairfax Forrest Man. Co. v. Chambers, supra*, it was held that "our Courts have jurisdiction in regard to contracts whether made in or out of this State, and where the suit is brought by a non-resident against a non-resident defendant upon a foreign contract, if the defendant voluntarily appears, and the case is tried upon its merits, the validity of a judgment rendered in such a case cannot be questioned." There, as here, the defendant was a non-resident corporation and the proceedings were begun by suing out a foreign attachment. If, then, our Courts have jurisdiction in respect to, and the section in question is general enough to include foreign contracts, we can see no reason why they should not be held to be embraced within its terms. To exclude them would be to deprive citizens of other States of rights and privileges to which they are entitled. *LeRoy v. Crowningshield*, 2 Mason, 157; *Paine v. Drew, supra*. But it was urged that to adopt the liberal construction and thus assume jurisdiction over foreign litigants would make the Courts of this State the battle-ground on which would be waged a never-ending war. The danger, if any, is more imaginary than real.

In *Paine v. Drew, supra*, SARGENT, J., who delivered the opinion of the Court in that case, said: "The objection that our Courts will be crowded with stale claims from abroad, to the exclusion of their legitimate business, is purely imaginary. The fact that this question is now for the first time directly raised, is a sufficient answer to the objection."

No authority has been produced to sustain the defendant's position. On the contrary, a number of Courts of the highest authority have held, in construing statutes more or less like ours, that the more liberal construction is the more reasonable and just one. We will examine a few of them,

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though the language of the statutes construed differs more or less from each other and also from our own statute, so that decisions based upon them cannot always be accepted as of controlling authority. The case, however, just cited, *Paine v. Drew, supra*, is so similar in all its facts to the one at bar, and the opinion of the Court is so full and clear, that it deserves more than ordinary consideration. The statute of New Hampshire (Public Stats., 1891, ch. 217), provides that "If the defendant at the time the cause of action accrued or afterwards was absent from or residing out of the State, the time of such absence shall be excluded," &c. It was held (*Paine v. Drew*), that a citizen of Maine suing a citizen of Massachusetts, in the Courts of New Hampshire, the latter could not avail himself of the Statute of Limitations in any other manner than as though the plaintiff were a citizen of New Hampshire; in other words, that the statute would not protect him until he had been in New Hampshire long enough to allow the plaintiff to sue within the time limited. In commenting upon provisions of statutes of the various States like our section 5 of Art. 57, it was said, "it has been held almost uniformly, that these words, *absence, return, leaving property, &c.*, are not confined in their application to those who have once been inhabitants, but are equally applicable to those who have never before been in the State; to foreigners as well as citizens," and that whether the statute runs against a claim or not, depends entirely on the presence or absence of the *defendant*, and that it matters not whether the plaintiff be resident or non-resident, absent or present in the State. In the case of *Ruggles v. Keeler*, 3 Johns. 263, CHANCELLOR KENT took the same view, and that, too, upon the construction of a statute substantially like ours. He said, "whether the defendant be a resident of this State and only absent for a time, or whether he resides altogether out of the State, is immaterial. He is equally within the proviso." The proviso referred to is that "if the defendant shall be out of the State" he shall have no benefit of the statute, &c. And in the case just cited both parties were non-residents.

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In *Graves et al. v. Weeks*, 19 Vermont, 181, it was held that the statute of that State extended to the case where both parties were residents of another State, and the debtor is within the State of Vermont for temporary purposes. The statute was that limitations should not run "when the debtor at the time the action accrued was out of the State." To the same effect are *Hartley v. Crawford*, 12 Neb. 471; *Kemp v. Bader*, 86 Tenn. 189; *Power v. Hathway*, 43 Barb. 214; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Larson v. Aultman*, 86 Wisconsin, 281; *Bulger v. Roche*, 11 Pick. 36; *Goets v. Voelinger*, 99 Mass. 504; *McCann v. Randall*, 147 Mass. 81. In *Angell on Limitations*, sec. 205, the author says: "The Acts of Limitations of Maryland of 1715 and 1765 are by judicial construction to be taken together and to receive an interpretation to carry into effect the plain and obvious intent of the Legislature, which was that limitations should not attach against a creditor where the debtor was absent from the State." And he cites *Hysinger v. Baltzell*, *supra*, where the defendant was a resident of Pennsylvania when the cause of action accrued, and it was held he could not plead the statute, because he had not been here long enough to afford the plaintiff an opportunity to prosecute his writ. It is true that in *Hysinger & Baltzell* the plaintiff was a resident of this State, but as we have seen, both residents and non-residents stand upon the same footing in this respect, *Frey v. Kirk*, *supra*; and the absence or presence in the State of the plaintiff has no effect whatever upon the running or not running of the statute. *Paine v. Drew*, *supra*; *White v. White*, *supra*. In conclusion, we will refer to the case of *Maurice v. Worden*, *supra*, which we think gives a clear and satisfactory construction of section 5, entirely confirming the views here expressed. The whole question raised by the defendant here is whether that section applies to it. The contention is that the section referred to will be so construed as to restrict it to resident debtors, and reliance was placed here, as there, upon section 4 of the same article of the Code and its relation to section 5, the

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argument being that inasmuch as the former related only to residents, the latter, which was claimed to be a supplement to it, had no other or greater significance. This Court, however, seems to have placed very little reliance upon section 4 for any purpose, and declared it to be so ambiguous that it is practically useless—so useless that it was said the profession did not seem ever to have relied on it. But in regard to section 5, it was said that the meaning of the phrase therein used, namely, "out of the State," is identical with the well known expression "beyond the seas," or, "out of the actual jurisdiction," "beyond the reach of process of the State." We have already seen that the words "beyond the seas," whether used in Statutes of Limitations in regard to creditors or debtors, have always been held to apply to both residents and non-residents, unless otherwise provided, as for instance in the Illinois Statute. "Without undertaking," said this Court in the case just cited, "to review all the cases in which have been construed, the words 'beyond the seas,' and 'out of the State,' there is in reality no conflict among them, and they all tend to ascertain whether or not in the particular case the party could be reached by the process of the Court. If he can be reached by process, it matters not whether he be resident or not, for in either case he will be protected by the statute, unless his creditor sues him within the time limited—and this without regard to whether the creditor be present or absent from this State. And, on the other hand, if the debtor cannot be reached by process, he is "beyond the seas," "absent out of the State." And therefore, although a defendant may be actually within the territorial limits of the State, if he is beyond the reach of process, he is, within the meaning of the statute, "out of the State." *Maurice v. Worden, supra;* *Sleight v. Kane, 1 Johns. Cases, 76.*

Judgment reversed and cause re-

(Decided June 19th, 1895.) *manded for new trial.*

ROBINSON, C. J., BRYAN and BRISCOE, JJ., dissent.

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Syllabus.

ISAAC L. NICHOLSON, JR., ET AL., *vs.* SAMUEL D.
SCHMUCKER, TRUSTEE IN INSOLVENCY, ETC.

Insolvency—Unlawful Preference—Bona Fide Sale—Statute of Frauds.

A conveyance of real estate made by a person who is adjudicated an insolvent within four months thereafter, is not void as a preference under the insolvent law, when the consideration thereof was paid prior to the date of the deed, and the same was executed in pursuance of a valid contract to make the conveyance.

Defendants, who were co-owners with N. of certain real estate, agreed to buy his interest therein for \$7,000. Certain negotiable bonds belonging to defendants were in the possession of N. for safe-keeping, and it was agreed that he should take seven of these bonds in payment for the property. The deed from N. was not executed until more than a month after the agreement. At the time the agreement was made N. had, without the knowledge of the defendants, hypothecated one of their bonds and sold another, but defendants believed N. to be solvent, and there was no intent to acquire a preference. Within four months after the execution of said deed, N. was adjudicated an insolvent, and his trustee in insolvency filed a bill to vacate the conveyance, as containing an unlawful preference. *Held*, that the deed did not create such preference, but was a *bona fide* conveyance for a consideration paid at the time, and as such is valid under the Act of 1890, ch. 364.

In the above case the parol agreement to convey the land was not void under the Statute of Frauds, since it was fully performed on both sides.

Appeal from the Circuit Court of Baltimore City. On February 24th, 1892, Johns H. R. Nicholson, who was the surviving partner of the banking firm of J. J. Nicholson & Sons, was adjudicated an insolvent debtor, and the appellee became in due course permanent trustee of the insolvent's estate. On the 31st day of October, 1891, being less than four months prior to the filing of the petition in insolvency, the insolvent, jointly with his wife, executed to his brother, who is the appellant, Isaac L. Nicholson, Jr., a deed conveying certain real estate in Baltimore City, including an undivided interest in the bank building occupied by J. J.

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Nicholson & Sons. The deed is for a nominal consideration and is absolute in form, disclosing on its face no trust of any kind. The testimony of Isaac Nicholson (Protestant Episcopal Bishop of Milwaukee), explaining the circumstances under which the deed was made, is set forth in the opinion of the Court. The plaintiff's evidence in this case was to the effect that at the time the agreement for the transfer of the real estate was made, one of the bonds belonging to the defendants had been sold by J. H. R. Nicholson without their knowledge, and another had been in like manner hypothecated by him as security for a loan. Bishop Nicholson did not then see the bonds.

The preliminary trustee in insolvency having discovered upon the records the deed from Johns to Isaac, reported the fact to the Insolvent Court and was directed to file a bill to set it aside. Isaac having by his answer to the original bill disclosed his relation to his sisters, in the transaction, an amended bill was filed bringing them into the case as co-defendants. The Court below (WRIGHT, J.), made a decree vacating the deed from Johns to Isaac L. Nicholson, and declaring that the property thereby sought to be conveyed was vested in the trustee in insolvency.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

Wm. Pinkney Whyte, for the appellants.

Samuel D. Schmucker and George Whitelock for the appellee.

Johns H. R. Nicholson, the grantor in the deed in question, was a banker and insolvent at the time it was made, and his creditors, within four months thereafter, availed themselves of the provisions of the insolvent law by filing the petition upon which he was adjudicated an insolvent. The deed, therefore, under section 24 of Art. 47 of the Code, must be *prima facie* regarded as having been intended to hinder, delay and defraud the creditors of the grantor. The

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burden of proof is, under the insolvent law, upon the parties to the deed to rebut the presumption of its invalidity. The record shows that they have utterly failed to do this.

The deed is also void under section 14 of Art. 47 of the Code, as amended by chapter 364 of the Acts of 1890, which provides in substance that no conveyance executed by any banker being insolvent shall be valid if the same contain any preference, provided the grantor be proceeded against under the provisions of the insolvent law by his creditors within four months after the making of the deed. This section of the law is aimed not only at deeds of which the sole purpose is to create a preference, but it strikes down all deeds which "contain any preferences." It is not necessary that the preference relate to the whole estate conveyed by the deed or to the entire consideration for the deed. The preference may be small in amount, and relate to a matter which is merely incidental to the main object of the deed. *Wolfsheimer v. Rivinus*, 64 Md. 230; *Lineweaver v. Slagel*, 64 Md. 488; *Alderdice v. State Bank*, 11 B. R. 398.

At the time of the conversation between Johns and Isaac in September, Johns knew his own insolvent condition, and that he had already taken and disposed of some (if not of all) of the seven bonds in question, and he therefore knew perfectly well that he was making an arrangement with Isaac to prefer his two sisters, Mrs. White and Mrs. Shriver, at the expense of his creditors at large. Such an arrangement has been uniformly held to be a violation of the spirit and purpose of insolvent laws and to be void. The validity of the security must be determined as of the date when it is actually given, and in the light of the then existing circumstances. *Forbes v. Howe*, 102 Mass. 427; *Bank of Leaveworth v. Hunt*, 11 Wall. 391; *Arnold v. Maynard*, 2 Story, 349; *Graham, Assignee, v. Stark*, 3 Ben. 520; *Lloyd, Assignee, v. Strobridge*, 16 Bank. Reg. 197.

The appellants further seek to escape the operation of the insolvent law upon this deed, by claiming that it was executed in fulfillment of a previous contract of sale made at

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the interview between the brothers in September. This claim cannot be maintained, because the evidence shows plainly that the understanding arrived at between the brothers at their interview in September was merely a verbal one, and that no written memorandum of it, such as is required by the Statute of Frauds to constitute a valid agreement for the sale of real estate, was ever made. *Clabaugh v. Byerly*, 7 Gill, 354; *Albert v. Winnin*, 5 Md. 77.

• BRISCOE, J., delivered the opinion of the Court.

This is a proceeding in equity by Samuel D. Schmucker, trustee in insolvency of Johns H. R. Nicholson, to avoid and set aside a conveyance of certain real estate made by deed to the appellant, Bishop Nicholson, as trustee for his sisters, Mrs. White and Mrs. Shriver. Bishop Nicholson owned at the time of the purchase one-seventh of the property in his own right and held five-sevenths as trustee for his sisters, which, with the one-seventh here conveyed by his brother Johns, gave him the entire property. The bill charges, first, that the deed was made with intent to delay, hinder and defraud creditors, contrary to the insolvent law. Secondly, that it was given in payment of an antecedent debt and gives a preference against the terms of the insolvent law.

It appears from the record that the sale was made, and the consideration therefor, seven thousand dollars in bonds, was paid in September, 1891, while the deed was not executed until the 31st of October, 1891. Nicholson was adjudicated an insolvent on the 24th of February, 1892, within four months after the execution of the deed. Bishop Nicholson in his testimony explains the circumstances of the sale and of the making of the deed, substantially as follows: "I was about to move west permanently; there were two remaining pieces of property, undivided, belonging to my father's estate; I had a desire, as soon as possible, to sell them both off and close out the estate. The two pieces of property were the two spoken of in that deed; I came on

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to see my brother John about the second week in September; I saw him at his office; was in town about two hours that day between the trains; stood outside his counter and talked with him over his counter. I told him I had had inquiries about the purchase of the banking house property; the Hopkins Savings Bank people were after me about it, asking its price; also a Mr. Reed, P. J. Reed, I think his name is, and I suggested to him that I would be willing to buy out his share in that undivided estate, and buy it in the interest of my two sisters, Mary and Martha, for whom I was trustee, and I told him I would give him \$7,000 for the properties as they were, and he agreed to that; I told him that he might take \$7,000 of the bonds, and I specified the bonds which were then in his possession for safe keeping belonging to my two sisters; the matter was concluded that day before I went back; I told him to take the bonds, and that very soon I would have the deed made; I told him that about the first of January I would be on again and then we could settle the matter of premium, but in the meantime, the sale being *bona fide*, he might take bonds and I would take the property. I asked him about the deeds, who should make them; he advised me to copy the deed literally, changing only the names and dates, the deed which I held from my brother, Charles G. Nicholson, covering precisely the same property. I then copied the deed literally, changing only the names and dates. The sum was precisely the same as in the original case of my brother, \$7,000, so this was \$7,000; my brother Johns said he would be glad if the girls could make a little turn out of the matter; the deeds were drawn afterwards; the exact dates I can't recall; I felt in no great hurry about the matter."

The proof further shows that the appellant had no knowledge at the time, of the financial condition of the vendor, but believed him to be absolutely solvent; that the sale was entirely *bona fide*, and not made for the purpose of indemnity for any loss or apprehended loss on the part of the vendee. It does not appear from the evidence that

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there was any fraudulent intent on the part of either the vendor or vendee. On the contrary, the *bona fides* of the transaction is fully established by the proof. By the Act of 1890, chap. 364, amendatory of Code, Art. 47, such sales are specially excepted from the provisions of our insolvent laws. This Act provides that nothing herein shall apply so as to set aside or render invalid the lien of any such judgment, mortgage or other conveyance executed by the debtor for money *bona fide* loaned or paid at the time of the creation of such judgment, mortgage or conveyance, but such shall remain a valid and subsisting lien, although the debtor may be proceeded against, or may apply for the benefit of the insolvent law under this Act. In the case of *Hinkleman et al. v. Fey*, 79 Md. 112, this Court said that this Act was passed for the purpose of removing all doubt about *bona fide* loans made at the time. It is an important provision, as a merchant, banker or other person mentioned, might otherwise be unable to borrow money to enable him to meet pressing demands and thereby avert financial disaster.

It is, however, insisted that the conveyance of the real estate contains a preference, because the bonds for \$7,000 given for the purchase of the property, were delivered prior to the execution of the deed, and that at the time of the sale one of the bonds which had been in possession of the vendor, had been sold by him. But to this we cannot agree. The preference at which the law is directed can only arise in case of an antecedent debt. Here there was no such debt. It appears that the bonds were transferred at the time of the sale without any knowledge that the vendor was insolvent, or contemplated insolvency. Bishop Nicholson testified that he never knew of the hypothecation of the bond, nor did he authorize it, but that he was informed that they were all in the "mutual box" at the time of the sale. In the case of *Williams v. Clark*, 47 Minn. 53, it was held that a conveyance of real estate by an insolvent debtor, which, standing alone, would be void as a prefer-

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ence under the insolvent law, is not thus avoided if it be made pursuant to a prior valid and enforceable contract legally obligating the debtor to make the conveyance. And in *Bush v. Boutelle*, 156 Mass. 167, a case somewhat similar to the one now under consideration, Judge Morton, in delivering the opinion of that Court, says: "The money was lent and the security taken, for aught that appears, in good faith. It is not enough to avoid the conveyance, that the party was insolvent when it was made, and knew himself to be so, if the conveyance was not made to secure an antecedent debt, or with any intention on the part of the defendant to defeat the provisions of the insolvent law, or with reason to believe that such was the purpose of the insolvent, but was given as security for a debt then incurred." Of course it would be otherwise if the agreement to give security was executory, and at the time the security was given there was clearly an antecedent debt. *Bentley v. Wells*, 61 Ill. 60.

In answer to the objection made by the appellee that the agreement was void by the Statute of Frauds, we need only say that the Statute of Frauds has no application to a contract which has been fully performed on both sides, like the one in this case. *Browne on the Statute of Frauds*, sec. 116; *Ellicott v. Peterson's Exs.*, 4 Md. 491; *Post v. Corbin*, 5 N. B. R. R. 11; *Sparhawk v. Richards*, 12 N. B. R. R. 79; *Cook v. Tullis*, 18 Wall. 332; 9 N. B. R. R. 433.

Being then clearly of the opinion that the deed in question is entirely valid, and that the conveyance ought to be sustained, the decree will be reversed and the bill dismissed with costs to the appellants in both Courts.

*Decree reversed and bill dismissed
with costs in both Courts.*

(Decided June 18th, 1895.)

DAVID J. LEWIS *vs.* THE DAILY NEWS COMPANY
OF CUMBERLAND.

Libel—What is Actionable per se—Innuendo—Demurrer.

Falsely to publish of one that he "would be an anarchist if he thought it would pay," is libellous *per se*.

Every publication injurious to one's reputation is in law false and malicious until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive.

Upon a demurrer to the declaration in an action for libel, it is for the Court to determine whether the words charged amount in law to a libel, and whether the innuendo is fairly warranted by the language declared on.

An innuendo cannot enlarge, or add to the sense of the words declared on or properly impute to them a meaning which the publication either in itself or taken in connection with the inducement and colloquium does not warrant or fairly imply.

Appeal from the Circuit Court for Allegany County. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

Ferdinand Williams and W. C. Devecmor for the appellant.

David W. Sloan and John G. Wilson (with whom was Robert R. Henderson, on the brief), for the appellee.

To enable the plaintiff to recover the publication must be:
1. *Libelous per se*, in (a.) Imputing to him criminal conduct which would subject him to corporal punishment. *Wagaman v. Byers*, 17 Md. 183, or in (b.) Imputing to him conduct which tends to injure his reputation and expose him to hatred and contempt among honorable men. *Negley v.*

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Farrow, 60 Md. 175. "That is from which the law would infer damage as being *necessarily* occasioned by the publication." *Newbold & Sons v. Bradstreet*, 57 Md. 52. In either which events, upon proof of publication, the plaintiff would be entitled to recover *general* damages for the loss to his standing and reputation, which the law presumes without proof, from the fact of the publication of the libel. 13 Am. and E. Ency. 325.

2. Or of such a character that special damage to the plaintiff may result from the publication as the natural and proximate, though not necessary consequence of the publication. *Newbold v. Bradstreet*, 57 Md. 53. And then the declaration should set forth in what way the special damage resulted. *Pollard v. Lyon*, 91 U. S. 225; *Walker v. Tribune Co.*, 29 Fed. Rep., 827. When words are not actionable *per se*, special damage must be alleged. *Stone v. Cooper*, 2 Denio, 293; *Golderberger v. Phil., &c., Co.*, 42 Fed. Rep., 42; *Dorsey v. Whipps*, 8 Gill, 457; *Wilson v. Cottman*, 65 Md. 190; *Cook v. Cook*, 100 Mass, 194; *Williams v. Hill*, 19 Wend. 305.

The right of the plaintiff in this case to recover, if at all, rests, therefore, under one or other of the subdivisions (*a*) and (*b*) of the first head. It can hardly be contended that the language complained of imputes to the plaintiff the commission of a crime, such as would subject him to corporal punishment. Taking the allegations of the declaration as true, for the purpose of argument, it charges no more than that the plaintiff for a money consideration, or if he thought it would inure his personal gain, would be an anarchist. A contingency must therefore happen before the plaintiff would commit a crime, if that which is charged be a crime. At most, this merely charges him with having a guilty mind, and to charge a man with having guilty thoughts or a guilty intent, is not to charge him with the commission of a crime. 13 Amer. and Eng. Enc. of Law, 353.

Before discussing the second subdivision it will be well to stop for a moment and get, if possible, the legal focus through

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which Courts view suits of this character, and apply it to the language complained of in this case, bearing in mind also that it is part of a report of a political convention. "While Courts have felt that the best interests of society require in many cases that the slanderous words shall be considered as actionable *per se*, they have been careful to guard against encouraging an idle and vexatious spirit of litigation by affording too great facility to this species of action. *Griffin and wife v. Moore*, 43 Md. 25. "In deciding which words should be deemed actionable, the Courts have shown no wish to encourage a litigious disposition." *Dorsey v. Whipps*, 8 Gill, 463; *Rue v. Mitchell*, 2 Dallas, 58. "Actions of slander and libel, unless they are brought in respect of a serious charge, are not to be encouraged." *Jenner v. A'Beckett*, Law Reports, 7 Q. B. 11. The publication charges the plaintiff with nothing more than vacillation in his political beliefs. He had "made several talks" before a Populist Club; he was representing the Sixth District on this occasion by proxy, and if it would advance his political ambitions he would join any other political organization. It is facetious in its character. To use the language of the Court in *Press Co. v. Stewart*, 110 Pa. St. 603, "at the most it is a harmless bit of pleasantry." And see also *Donaghue v. Gaffy*, 54 Conn. 257; *Homer v. Englehart*, 117 Mass. 539.

Every reflection upon a man's character or motives does not constitute a libel in law, and the super-sensitive person whose conduct is commented upon or criticised will not have his litigious spirit gratified by the Courts, unless the Court can see from the article that the language used tends to injure him and that it is properly pleaded, and in doing so the Court will adopt the innocent rather than the offensive meaning of the words, and will look at the circumstances under which they were used, in applying the meaning. In *Goldstein v. Foss*, 6 Barn. & Cres., 154, also reported in 2 Younge & Jervis, 145, the plaintiff was published as not a proper person to become a member of the

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Society of Guardians for the protection of trade against swindlers and sharpers. This was held not to be a libel. In *Robinson v. Jermyn*, 1 Price, 11 (Exchequer Reports), the allegation was that the plaintiffs were not proper persons to be associated with and was held not to be a libel. In *Hackett v. Providence Telegram Pub. Co.*, 29 Atlantic Rep., 145, the declaration by innuendo charged the plaintiff with embezzlement, but the words complained of, which were to the effect that the plaintiff had collected money and failed to pay it over and put off the payment by various excuses, were held not to justify the innuendo, because he may have had other reasons. In *Trimble v. Anderson*, 79 Alabama, 514, it was by innuendo charged that notes had been obtained fraudulently upon a publication that they had been obtained without consideration. Held no libel because they might have been obtained otherwise. In *Mulligan v. Cole*, Law Rep. 10 Q. B., 549, the Court held that a publication which charged that plaintiff's connection with a certain institute had ceased, and that he was not authorized to receive subscriptions on its behalf, from which the innuendo was drawn that the plaintiff had falsely assumed and pretended to be authorized to receive such subscriptions, was not libelous, reading the words in their ordinary sense, and that the innuendo was not justified, inasmuch as the words conveyed no more than legitimate information to the public.

The People v. Jerome, 1 Mich. 142, was an action based upon a publication commenting upon the action of a druggist who "refused to contribute his mite" towards sprinkling the street in front of his place of business, in which the Court, in affirming an appeal from the judgment of the lower Court sustaining the demurrer, said: "The general rule that a libel upon an individual is a malicious defamation expressed either in print or writing, intending to blacken the memory of one who is dead, or the reputation of one that is alive, and expose him to public hatred, contempt and ridicule, is plain and easily understood, but its application,

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in most of the cases which have been presented to the Courts, has been found to be difficult. There are many cases in which the rule does not furnish a sure guide, and this, to my apprehension, is one of them."

In *Golderberger v. Phila. Grocery Pub. Co.*, 42 Fed. Rep., 42, the publication charged the President of the Grocers' Association with being actuated by a love of a per diem and not by patriotism or love of his guild, and was held not libelous. The publication complained of contained these words: "*O, tempora! O, Mores!* What a pity that the grocers of this city could not find one so unselfish as to do such work without the hope of gain giving birth to activity." No special damage was alleged in this case, and the demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action. It was contended that the article held him up to contempt and ridicule, but the Court said: "This claim calls for the consideration of the question whether any published sneer or pleasantry which may create a smile at the expense of the plaintiff, but which criticises his conduct in no important particular, is libelous *per se.*"

In *Capital and Counties Bank v. Henty*, Law Rep. 7 H. L. 744, in quoting from *Sturt v. Blagg*, 10 Q. B. 908, it is said: "In deciding on the question whether the words are capable of that meaning, he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives and reasons."

The appellant relied in the lower Court upon the Illinois decision, *Cerveny v. Chicago Daily News Co.*, 13 L. R. A. 864, in which it was held that a publication which charged the plaintiff with being an "anarchist," was libelous *per se.* But we submit that there is a distinction between the Illinois

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case and the present case, in the circumstances under which the words were used, and that the words complained of in the present case have as their plain meaning and application, a very different effect from the words used in the Illinois case. The words complained of in this action clearly contain the statement that the plaintiff is *not* an anarchist, and that he would only be such under a certain combination of beliefs and *circumstances*.

The innuendoes in the first and second counts of the declaration that the "plaintiff would for a money consideration be an anarchist," are plainly not warranted. The words actually used were that the plaintiff "would be an anarchist if he thought it would pay," and following as they did the statement that his political creed had vacillated between some other and populism, they clearly meant that he would be anything else in politics that he thought would pay him politically. There is nothing in the words themselves to suggest a money consideration, and if that meaning is to be imported into them they should be preceded by a colloquium.

We do not concede that the definitions of an anarchist, set out in the second and third counts of the declaration, could have been the meaning of this particular publication.

Generally an anarchist is understood to be a man who holds a certain set of opinions, but it certainly cannot be maintained for a moment, as it apparently is in the innuendoes, that every anarchist has actually been guilty of and engaged in unlawful, treasonable and felonious designs and acts, or is now violently seeking to overturn all government, law and order.

Thus the innuendoes clearly "expand and enlarge the meaning of the words used, and give to them a particular meaning different from that in which they would ordinarily be understood" by those reading the publication complained of, and they should therefore be rejected and the demurrer sustained, unless the words are actionable in themselves.

McSHERRY, J., delivered the opinion of the Court.

This is an action of trespass on the case for libel. The declaration contains three counts. A demurrer to the whole declaration was filed and upon being ruled good judgment was entered for the defendant, and the plaintiff then took this appeal. The defendant is the owner, proprietor and publisher of a newspaper called the "Daily News." The words which are complained of and which were published by the defendant are as follows: "Mr. davy lewis, proxy for some one in the Sixth District, a member of the Populist Club in this city, before which he has made several talks, who would be an anarchist if he thought it would pay." Meanings are ascribed to these words by the innuendees employed in the three counts of the *narr.* The demurrer, of course, admits the publication of the alleged defamatory language by the defendant, its untruthfulness and the malice which prompted its promulgation; but raises the questions, first, whether the words as explained by the innuendees are actionable, and secondly, whether the innuendees fairly express the effect and meaning of the published words. Upon demurrer it is always the province of the Court to determine whether the words charged in the declaration amount in law to libel or slander. *Dorsey v. Whipps*, 8 Gill, 462; *Haines v. Campbell*, 74 Md. 158; *Avirett v. The State*, 76 Md. 510. And it is equally matter of law as to whether an innuendo is good; that is to say, whether it is fairly warranted by the language declared on, when that language is read, either by itself, or in connection with the inducement and colloquium, if there be an inducement and colloquium set forth. *Avirett v. State, supra*; *Solomon v. Lawson*, 8 Q. B. 828. But the innuendo cannot enlarge, extend or add to the sense or effect of the words declared on, or properly impute to them a meaning which the publication, either in itself, or taken in connection with the inducement and colloquium, does not warrant or fairly imply.

Now, what words are libelous? "It is well settled that any publication which tends to injure one's reputation and

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expose him to hatred or contempt, if made without lawful excuse, is libelous." *Negley v. Farrow*, 60 Md. 175; *Snyder v. Fulton*, 34 Md. 128; *Hagan v. Hendry*, 18 Md. 191. Malice, in an action of this kind, consists in intentionally doing without justifiable cause that which is injurious to another, and everything injurious to the character of another, is, in this action, taken to be false, until it is shown by plea to be true. Therefore every publication injurious to the character, is, in law, false and malicious, until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive. *1 Am. Lead. Cases* (ed. of 1857), 116, notes to the case of *Steele v. Southwick*.

The words complained of charge that the plaintiff "would be an anarchist if he thought it would pay," and the innuendo defining their import in the first count is, "meaning thereby and intending to charge that the plaintiff would for a money consideration be an anarchist." The second count, after setting forth a definition of the word anarchist, explains the meaning of the alleged libelous publication to be that the plaintiff would for a money consideration be an anarchist and engage in the unlawful, treasonable and felonious designs and acts of anarchists. And the third count avers that the word anarchist means a person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society and law and order and all right of property; and that the words "if he thought it would pay," mean that the plaintiff would, if he thought it would inure to his personal gain, from mere lust of plunder, endeavor to destroy all right of property and all law and order.

Falsely publishing of an individual that he is an anarchist is libelous. *Cerveny v. Chicago Daily News Co.*, 13 L.R.A. 864. The declaration alleges that an anarchist is universally accepted by all law-abiding persons in all countries as meaning an enemy and conspirator against all law and social order, and as one who uses unlawful, violent

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and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives, and employs assassination of persons in authority as means of accomplishing his unlawful designs against society. Obviously, then, to publish of and concerning an individual that he is such an enemy of law, of order, of society and of human life, is grossly libelous, and is far from merely charging him, as suggested in the argument, with being only a political propagandist, advocating visionary schemes, for anarchy, as defined in the declaration, and as generally understood, is avowed hostility to all governments, and open antagonism to all political parties, every one of which professes to support some form of government, and generally that which its members consider the best. It cannot be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of the bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs against every form of government and against every right of property. It is equally apparent, that to accuse another of being an anarchist, in the sense in which the term is generally accepted, is to accuse him of that which will inevitably injure his reputation and expose him to obloquy and ignominious reproach. If this be so, then, to publish of another that he "would be an anarchist if he thought it would pay," is to impute to him the possession of that degree of moral obliquity and turpitude which would mark him as a fit person, if he were personally benefited thereby, to do the violent and felonious acts of which anarchists are known or believed to be guilty. It fixes upon him a stigma which would cause all honest and upright people to shun him, because a man who would be an anarchist if it would pay him to be one, is of necessity not only a person devoid of all moral restraint, but one under the dominion of the worst of human passions, and ready, for self-aggrandizement, to commit the most grievous crimes against the State, against so-

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ciety and against the individual. And it matters not whether the alleged motive that influences him be an expectation of pay in actual money, or the hope of personal gain inspired by the mere lust of plunder, for in either event the obvious meaning of the charge is, that for gain, however acquired, he would be willing to become an obdurate criminal, an enemy of mankind and a conspirator against the government under which he lives. Surely such a person would merit universal execration, and to charge that an individual would be thus guilty for gain, would undeniably subject him to contempt and hatred, and would, therefore, be actionable in itself.

It only remains to inquire whether the innuendoes do more than point out or define the meaning of the libelous words ; and about this there can be no possible difficulty. They neither enlarge them nor give to them a significance at variance with their natural and ordinary meaning. The plaintiff is named in the article. He is named, too, in such a manner as necessarily to expose him to ridicule, for the initial letters of both his christian and surname are printed in small type, with an obvious view of belittling him in the public estimation. The innuendoes further set forth the meaning of the words "anarchist" and "pay ;" and they ascribe to them their usual and generally accepted import, defining them in a paraphrastic way, and pointing out that they were intended to apply to the plaintiff. This is strictly within the office of an innuendo.

For the reasons we have given we consider the declaration sufficient in law. We do not deem it necessary to examine and review the various cases cited by the appellee's counsel in the exceptionally able arguments made by them at the bar, because the law respecting libel is too well settled in Maryland to be shaken by decisions elsewhere, even if upon a strict analysis those decisions were shown to be in conflict with our own.

*Judgment reversed with costs above
and below, and new trial awarded.*

(Decided June 19th, 1895.)

NOAH LEE COLE *vs.* JULIUS HINES.

Waiver of Forfeiture—Sales on the Instalment Plan—Election Between Inconsistent Rights.

Where a party has a right either to rescind a contract or to continue it in force, his election when once made is final, and he cannot afterwards alter his determination.

Where a contract for the sale of goods on the instalment plan provides that upon default of the buyer in paying any instalment the contract might, at the option of the seller, be annulled, and the latter entitled to retake the goods, and the seller, after a default, promises to extend the time of payment of such instalment, such promise is a waiver of his right to declare a forfeiture for that default, and he is not authorized to retake the goods until the expiration of the time so limited.

Appeal from the Court of Common Pleas of Baltimore City. The case is stated in the opinion of the Court.

The cause was agreed before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

Thos. Ireland Elliott and Charles F. Stein (with whom was H. H. Bowen on the brief), for the appellant.

W. Burns Trundle, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

Noah Lee Cole brought suit against Julius Hines in the Court of Common Pleas of Baltimore City, and the declaration is in these words: "That on the 4th day of April, 1893, the said Noah Lee Cole obtained from said Julius Hines merchandise, consisting of 'one suit of furniture, 18½ yards of carpet and one mattress,' upon the terms and conditions set forth in the paper hereto attached, for which he, the said Noah Lee Cole, agreed to pay fifty (\$50.10) dollars and ten cents, to be paid in monthly instalments of four dollars each,

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in the manner and at the times stated therein. That said Noah Lee Cole accordingly paid on account of said \$50.10 the sum of \$20, so that on the 15th day of October, 1893, being in arrears in his payments \$8, received from said Julius Hines a promise to wait two weeks for the payment of said sum of \$8, namely, until the 29th October, 1893, and an extension of the time specified in the contract for payment until said 29th October, 1893. That two days before the expiration of said two weeks, namely, on the 27th day of October, 1893, the said Julius Hines, by his agents, and knowing the said Noah Lee Cole to be away from home and therefore unable to prevent the wrongful seizure and make payment, forcibly entered the premises of said Noah Lee Cole, and removed the goods and merchandise purchased as aforesaid, to the great inconvenience, humiliation and injury of the said Noah Lee Cole and his family."

To this declaration the following contract was attached and was made a part thereof: "This indenture witnesseth, that I have this day rented from Julius Hines the articles hereinafter mentioned, upon the following conditions: That I shall pay to him the sum of \$1.00 cash, the receipt whereof is hereby acknowledged, and \$4.00 in monthly instalments, each and every 12th from day or date hereof, until the sum of \$50.10 shall be fully paid; the said Julius Hines will, upon the final payment, sell to me the said property, and execute and deliver to me a receipted bill of sale thereof. And I also agree to retain them as his goods, at 2017 Oak street, in the city of Baltimore and State of Maryland, for my own use; but nevertheless in trust for and as the property of Julius Hines, who neither parts with nor do I acquire any title thereto until the said sums are fully paid. I further agree not to remove the same from said premises, or sell or attempt to sell without the consent of Julius Hines; and in case of any default in any payments, or the falsity of my accompanying statements in any one particular, or in other violation of this contract, this agreement shall, at his option, be deemed annulled; and he is hereby authorized

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to enter my premises and remove said property ; and be it distinctly understood that I have rented these goods from Julius Hines upon the truthfulness of these representations. Julius Hines reserves the right to refuse to send the articles mentioned in this contract if not satisfactory to him. He also reserves the right to give more time than that agreed upon, if it suits his views, without vitiating this contract by such extension of time. Signature : Noah Lee Cole. Date : April 4th, '93. Occupation : Brakeman. By whom employed : N. C. R. R. Salesman : A. W. Hines. Notice of removal must be sent to my store. No articles exchanged and no money refunded if the articles are taken back."

The defendant demurred to the declaration, and judgment upon the demurrer being for the defendant the plaintiff has appealed. The appellee contends that his promise to grant an extension of time for the payment of the two instalments being a voluntary promise without consideration, was not binding, but that, notwithstanding such promise, he was at liberty to annul the contract, retake the goods and forfeit the purchase money already paid by the appellant. It will be observed, however, that this is not like the cases cited by the appellee, where there is a debt absolutely due and payable, and the creditor gratuitously promises to grant an extension of time for the payment. By the express terms of this contract, the vendor, in the event of a default by the buyer, had a right either to declare a forfeiture and retake the goods, or to waive the default and continue the contract in force. The declaration alleges conduct by the seller which, as will be subsequently seen, did amount to a waiver of the default, and the question is whether the defendant was bound by that waiver, or whether he could subsequently and for the same defaults that were so waived, enforce the forfeiture. It is therefore not the case of a mere promise to give indulgence to a debtor or to waive a future default, but one involving the consideration of the effect of an actual waiver.

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In all contracts where time is of the essence, a breach of the contract in that respect by one of the parties may be waived by the other party's subsequently treating the contract as still in force. *Pinckney v. Dambman*, 72 Md. 178; *Webb v. Hughes*, L. R. 10 Eq. 281; *Black v. Woodrow*, 39 Md. 194. In these cases of conditional sales, the acceptance by the seller of an instalment of the purchase money after default is a recognition of the contract as still subsisting, and a waiver of the forfeiture. *Hutchings v. Munger*, 41 N. Y. 158; *Hurst v. Thompson*, 73 Ala. 158. And other acts than acceptance may have the same effect.

A party cannot take two inconsistent positions. If he has a right either to rescind a contract on account of a breach by the other party or to continue it in force, and he elects to continue it in force, he thereby abandons the right to rescind, and is bound by the election so made. *Bollman v. Burt*, 61 Md. 422; *Md. Fer. Co. v. Lorentz*, 44 Md. 233; *Laurence v. Dale*, 3 John. Ch. 23. And so a vendor of chattels where a fraud has been practised, has a right either to affirm the contract and sue for the price, or to rescind it and retake the goods, but he is bound by his first election. *Troup v. Appelman*, 52 Md. 456. In like manner a cause of forfeiture in a lease may be waived. In *Addison on Contracts*, m. p. 260, it is laid down that "the right of entry for forfeiture of a lease is governed by the general law that where a man has got a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If, therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease or not, as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterwards annul the lease." *Leake on Contracts*, 3rd ed. p. 583, to the same effect.

In such cases of a waiver of a forfeiture, or of a right to rescind a contract, there is no necessity for a consideration,

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but the question turns rather upon the principle of election between two inconsistent rights. *Bishop on Contracts*, sec. 805; *Johnston v. Whitemore*, 27 Mich. 466; *Wheeler & Wilson Co. v. Teetzlaff*, 53 Wis. 220; *Devoe v. Jamison*, 33 Mich. 94.

A case similar in some respects to the case at bar is that of *Albert v. Grosvenor Ins. Co.*, L. R. 3 Q. B. 127, where LORD COCKBURN said: "This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of 2 £, which he is bound to do on each successive Monday till the loan is repaid. Now, the facts are that the plaintiff's wife went to Bayne (who must be taken to have had full authority * *) and told him that her husband had difficulty in meeting the instalment due on the 28th of August, and Bayne extended the time for payment of that and the next instalment to the 11th of September. Now, the bill of sale provides that if the mortgagor shall make 'default' in payment of the sum of 62 £, 10 s., or any part thereof, the whole amount shall be then immediately due and payable, and it shall be lawful for the mortgagees to take possession of the goods and to sell and dispose of them. Now, 'default' must be taken to mean a non-payment by a party bound to pay, without the consent of the parties having a right to waive the payment. And I see nothing which goes to show that, if by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale, and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a 'default.' "

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It is true that this case, so far as the meaning of the word "default" is concerned, was questioned by LORD JUSTICE BRAMWELL in *Williams v. Stern*, 5 Q. B. D., 412. But the bill of sale before the Court in *Williams v. Stern*, gave to the vendee a right to remove the property and sell it in the event of a failure to pay the instalments when due, and such failure made the whole debt due. Unlike the case at bar, it did not provide for an election between a right to declare a forfeiture and a right to continue the contract in force. In *Carpenter v. Blandford*, 8 B. & C., 575, there was a waiver of a default in payment which was held to be binding. It appeared in this case that the defendant had agreed to sell to the plaintiff certain property at an appraisement to be made by appraisers to be appointed by the respective parties. The price was to be paid on or before March 25th, and the buyer deposited a sum to be forfeited if he did not complete the agreement. The appraisers met on March 25th, when plaintiff's appraiser said that he could not finish the work till the next day. No objection was then made, but on the next day the defendant refused to proceed. In deciding the question of his right to do so, BAYLEY, J., said: "The defendant in this case insists on a forfeiture which is *strictissimi juris*. He ought therefore to shew that he has done everything which he was bound to do to entitle him to insist on the forfeiture and that he has not done anything to waive that right. * * It was the duty of the defendant's agent to inform his principal that such a communication was made, and it must be presumed that he did so. If that communication was made and the defendant meant to insist on the forfeiture, it was his duty to inform the plaintiff that he should insist on the forfeiture, unless the contract was completed on that day."

The principles are conclusive of the present case. The failure of the appellant to pay the instalments when due was a default which did not render the contract void or cause the entire purchase money to become due, but the contract was thereby made voidable at the option of the

appellee. It was then necessary for the appellee to elect whether he would avoid the contract, retake the goods and declare a forfeiture of the instalments already paid, or whether he would continue it in force and become entitled to the future payments. He made his election to continue the contract in force by his notification to the appellant, who had a right to rely upon it, and having thus waived the forfeiture on account of this particular default, it follows that he could not subsequently insist upon it.

*Judgment reversed and new trial
awarded with costs in both
Courts.*

(Decided June 20th, 1895.).

JOSEPH KLECKA *vs.* LENA ZIEGLER AND G.
HENRY ZIEGLER, HER HUSBAND.

Specific Performance of Contract by a Married Woman to Convey Her Real Estate.

A contract by a married woman to convey her real estate, executed jointly with her husband, is valid under Code, Art. 45, sec. 2, and specific performance of such contract will be decreed.

Appeal from a decree of Circuit Court No. 2, of Baltimore City (WICKES, J.), sustaining a demurrer to the bill of complaint and dismissing the same. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

Hermon L. Emmons (with whom was Howard M. Emmons on the brief), for the appellant.

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S. S. Field (with whom was *Samuel Regester* on the brief), for the appellees.

PAGE, J., delivered the opinion of the Court.

In the bill of complaint in this case, filed by the appellant, it is alleged that Lena Ziegler, being seized and possessed of two leasehold lots of ground, situate in Baltimore City, acquired by her under the last will of Anton Zenker, with her husband, leased to the appellant one of these lots for a term of two years, with the privilege of renewing the same for a further period of three years; that the lease contains a clause providing that at any time during the continuance of the demise or any renewal thereof, the appellant should "have the right to purchase" the demised premises, including the dwelling house on the west side of Dallas street, "upon tendering in payment therefor the sum of \$3,300, with all accrued rent, and the said Lena Ziegler and George H. Ziegler, her husband, their heirs and assigns, shall execute to him a good and sufficient deed of conveyance therefor;" that the appellant notified the appellees of his intention to purchase, tendered the price, and performed all the requirements on his part to be performed, but the said Lena and her husband have refused to make a conveyance of the property as they ought rightfully to do, and thereupon it is prayed that the agreement may be specifically enforced. The appellees demurred, and from the decree dismissing the bill the appellant has appealed.

The contention of the appellees is, that the agreement, the performance of which is prayed for in the bill, is void as to Lena Ziegler, because at the date of the execution she was a married woman. The solution of the question thus raised depends upon the construction to be given to the statutes of our State applicable to the subject; for it must be conceded that at common law a *feme covert* had no power to make a contract to convey her lands that could be enforced either in law or equity. By the second section of Art. 45 of the Code, as enacted in 1861, all the property,

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real and personal, belonging to a married woman at the time of her marriage, and all subsequently acquired, "she shall hold for her separate use, with power of devising the same as fully as if she were a *feme sole*, or she may convey the same by a joint deed with her husband, &c. This section was repealed by the Act of 1872, ch. 270, and a substitute enacted in lieu thereof. This substitute contains the whole of the original section, with two additions. By the first addition, where a husband is lunatic, &c., she may convey her property as a *feme sole*; by the second, it is provided that "any married woman may be sued jointly with her husband in any of the Courts of this State, or before any justice of the peace, on any note, bill of exchange, single bill, bond, contract or agreement, which she may have executed jointly with her husband, and may employ counsel and defend such action or suit separately or jointly with her husband; and judgments recovered in such cases shall be liens on the property of defendants, and may be collected by execution or attachment in the same manner as if the defendants were not husband and wife; provided, that in all cases where a married woman has made such contract or agreement as a *feme sole*, under section seven of this Article she may be proceeded against as therein provided." Referring to this statute in *Smith v. State*, 66 Md. 218, where the cause of action was a bond executed by a wife jointly with her husband, it was said, "there is no ambiguity, for the language is broad and comprehensive, and is applicable to every married woman who has executed any bond jointly with her husband. * * When the Legislature says she may be sued on any bond executed jointly with her husband, can the judicial department undertake to say that the law-makers meant that she shall not be sued on some bonds executed jointly with her husband? Such a determination could only be reached by a species of judicial legislation not sanctioned by any authority and extremely dangerous if once established as a precedent." The same reasoning will apply to contracts such as that with which we are now dealing. In

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plain terms the statute provides that a *feme covert* may be sued jointly with her husband, "on any contract or agreement" which she may have executed jointly with him. No words limiting the wife's power to make such contract are employed (except that she must execute it jointly with her husband); although the statute is an addition to and forms part of the Article of the Code which regulates the rights of *feme coverts* to and their powers over their estates, real as well as personal.

The construction we have thus given to this statute harmonizes, we think, with the general purposes characterizing the legislation of the State in relation to the rights of married women in their property, and their powers in dealing with it. We have said in *Hale & Hume v. Eccleston*, 37 Md. 510, that the main purpose of the second section of Article forty-five was to enable married women to maintain a separate credit, independent of their husbands. By the adoption of this section the separate estate was made a legal limitation, and the right and power of disposition was required to be exercised by her with the concurrence of her husband ; but notwithstanding all this, the property of the wife was not liable, even in equity, for her debts and incumbrances, except for such, as she with her husband, by express terms or clear implication, charged thereon. To enlarge her capacity to deal with her estate, and thereby enable her the more efficiently to maintain a separate credit, the Legislature has conferred upon her, by the Act of 1872, the power to deal with her statutory estate as fully as if she were a *feme sole*; provided always, she has the concurrence of her husband. Her capacity to contract, which formerly was merely a power to charge or encumber her separate estate, enforceable only in a Court of Equity, since the passage of that Act has been enlarged, and has now become a legal right, by the exercise of which she can at law bind herself personally, to the same extent as if she were a *feme sole*. She may now be sued jointly with her husband on any contract or agreement she may execute

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jointly with him, and judgments so obtained against her may be collected in the same manner as if the defendants were not husband and wife.

The trend of judicial decision in this country seems to be in the direction of placing liberal constructions in favor of the wife upon statutes of this description. In *Kingsley v. Gilman*, 15 Minn. 59, under a statute declaring that a *feme covert* shall hold "to the same extent as before marriage," the Court said, "if upon becoming a *feme covert* she has not the right * * to contract," to convey, "then she is not owner to the same extent as if she were a *feme sole*." In *Love v. Watkins*, 40 Cal. 561, the power to make an executory contract for the sale of land is maintained only after a most liberal construction of all the provisions of the statute "taken together." *Baker v. Hathaway*, 5 Allen, 104; *Union Brick Co. v. Lorillard*, 44 N. J. Eq. 3; *Dankel v. Hunter and wife*, 61 Pa. St. 384; *Dreutzer v. Lawrence*, 58 Wis. 595; *Baily v. Pearson*, 29 N. H. 85; *Felkner v. Tighe*, 39 Ark. 362; *Frarey v. Wheeler*, 4 Oregon, 190.

These authorities are cited, not as being decisive of this case, but as illustrative of the manner in which Courts have regarded statutes like that of the Act of 1872 and the principles they have applied when called upon to construe them. It follows from what has been said that there was error in sustaining the demurrer.

Decree reversed and cause remanded.

(Decided June 20th, 1895.)

THE FREDERICK-TOWN SAVINGS INSTITUTION
vs. JOHN L. MICHAEL.

Insolvency—Discharge of Surety on Note by Acceptance of Mortgage and New Note—Preferences—Liability of Married Woman Signing Joint Note with her Husband.

The plaintiff bank was the holder of promissory notes for money loaned to W. upon which the defendant was liable as surety. In response to plaintiff's demand for the renewal, with additional security, of the notes, some of which, including the one sued on in this case, were overdue, W. gave to the plaintiff bank the joint note of himself and wife for the principal sum of his entire indebtedness, and executed a mortgage to the bank of his real estate to secure the payment thereof, in which his wife united; and thereupon the former notes were delivered by the plaintiff to W. The bank knew at the time that W. had failed to pay his debts at maturity. Within four months after this transaction W. applied for the benefit of the insolvent law, and upon a bill filed by his trustee in insolvency, the mortgage from W. and wife to the plaintiff was vacated and annulled, as being a preference under the insolvent law, and it was decreed that the original promissory notes should be returned to the plaintiff bank. This action was instituted on one of them against W. and the defendant, and the latter pleaded payment and satisfaction. *Held,*

1st. That since the plaintiff had voluntarily accepted the note and mortgage of W. and his wife in lieu of the note sued on, and with knowledge of W.'s precarious financial condition, the liability of the defendant as surety was extinguished.

2nd. That although the mortgage was vacated as a fraudulent preference under the insolvent law, yet the note secured by it remained valid, and the liability of W.'s wife as joint maker thereof was unaffected.

A married woman may become surety on a note executed by her jointly with her husband, and in such case it is not necessary, in order to hold her liable, that the consideration of the contract should enure to her benefit.

Appeal from a *pro forma* judgment of the Circuit Court for Frederick County. This was an action of *assumpsit* by the appellant against the appellee and Wm. Wilcoxon, sur-

viving makers of the following promissory note: "Frederick, Md., Aug. 4, '92. Six months after date, we jointly and severally promise to pay to the order of the Frederick-Town Savings Institution, five thousand dollars, for value received, negotiable and payable at the Frederick-Town Savings Institution." (Signed), Wm. Wilcoxon, Andrew J. Wilcoxon, Jno. L. Michael. The defendant, Michael, filed the general issue plea and a special plea, "that before this action Wm. Wilcoxon, who was the principal maker of said note, satisfied and discharged the plaintiff's claim by payment." This plea was traversed by the plaintiff and issue joined. Judgment by default was entered against Wilcoxon, subject to his discharge in insolvency.

The evidence showed that in March, 1893, W. Wilcoxon, a merchant and trader, was indebted to the appellant bank in the sum of \$11,300, upon four promissory notes, two of which were not then due, and the other two, including the note sued on in this case, were overdue. On March 16, 1893, he was notified by the bank that the overdue notes must be renewed with additional security before the 23rd of that month, this notice being a repetition of a previous demand for renewal with additional security. On March 21, 1893, Wilcoxon gave to the bank the joint note of himself and wife for the said sum of \$11,300, payable six months after date, and executed a mortgage to the bank of certain real estate owned by him to secure the payment of the same. At the same time Wilcoxon was credited in his account with the plaintiff bank with \$11,300, the face of the new note, and with a check for \$227.64, drawn on another bank. The sum of \$115.86 was on that day the balance to the credit of Wilcoxon on the books of the plaintiff. He at once gave his check, payable to the plaintiff, against these credits, for \$11,643.50, which sum represented the aggregate amount of the four promissory notes, both due and unmatured, six months interest in advance, at five per cent., on the mortgage debt, and accrued interest on the overdue notes. This check closed and exactly balanced his account current with the plaintiff.

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Statement of the Case.

The old notes thus taken up, including the one which is the cause of action in this case, were then delivered to Wilcoxon. At the time of this transaction it was agreed between Wilcoxon and the bank that the money loaned on said mortgage note was to be applied solely to the payment of his indebtedness to the bank.

On May 6, 1893, within four months after the execution of said mortgage, Wilcoxon applied for the benefit of the insolvent law of the State of Maryland. On the 24th of the same month his trustees in insolvency filed a bill in equity against the Savings Institution and Wilcoxon and his wife, setting forth the above transaction and alleging that at the time of the execution of the said note and mortgage for \$11,300, and for a long period prior thereto, the said Wilcoxon was a merchant, manufacturer and trader, and was insolvent, and so continued up to the time of filing his application for the benefit of the insolvent laws of Maryland; that at the time of the execution of the said note and mortgage no money was *bona fide* loaned or paid by the Savings Institution to Wilcoxon, but the consideration of the same was wholly debts before that time owing to the Savings Institution, and said note, and mortgage which was given to secure said note, were intended for no other purpose than to pay and secure to be paid the said four notes; that accordingly, immediately upon the execution and delivery of said note and mortgage for \$11,300, and upon the receipt of the cash paid by said Wilcoxon, the Savings Institution delivered up to Wilcoxon the said four notes, which were then in the possession of the trustees in insolvency; that the mortgage given to secure the payment of said note for \$11,300 and the lien thereby created was a preference in favor of said Savings Institution over other creditors of Wilcoxon, and that the same was void under the laws of Maryland. (Code, Art. 47, sec. 14, as amended by the Act of 1890, ch. 364.)

Upon this bill the Circuit Court for Frederick County, in Equity, decreed that the said mortgage executed by Wilcoxon and wife to the Savings Institution be set aside

and declared null by reason of its being a preference prohibited by the insolvent laws of Maryland; that the said Savings Institution should pay to the trustees in insolvency the sum of \$343.50, less the sum of \$115.86, and that the Clerk of the Court should deliver to the Savings Institution the four promissory notes above mentioned. It was subsequently decreed in another equity case, between the same parties, that the dower interest of the wife of Wilcoxon in the land mortgaged by him and her to the Savings Institution did not pass to the mortgagee, but remained in her. No appeal was taken from the decrees, and on September 20, 1894, this action was instituted.

At the trial the first exception was taken to the refusal of the Court, *pro forma*, to admit in evidence the bill in equity filed by the trustees in insolvency, the answer of the Savings Institution, and the opinion and decree of the Court thereon. The second exception was taken to a similar ruling of the Court, refusing to admit evidence by the plaintiff showing that in obedience to the decree in said cause in equity, the said note for \$5,000, the cause of action in this case, was delivered back to the plaintiff, and that plaintiff paid to the trustees in insolvency of Wilcoxon the sum of \$227.64. The third exception was taken to the *pro forma* ruling of the Court, that under the pleadings and evidence the verdict must be for the defendant.

The cause was argued at January Term, 1895, before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE and ROBERTS, JJ., and was subsequently, under an order of the Court, re-argued at April Term, 1895, on notes filed by counsel.

Charles W. Ross and John S. Newman for the appellant.

If the contention of the appellee is correct, that is, if the contract in this case is valid so as to release the sureties on the original notes, and is such simply because the note of Wilcoxon and wife has not been declared void, then the ap-

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pellant will be adjudged to have accepted said note in payment when the same does not bear interest, and no interest has been paid on it; for the very money which was paid as interest, in the shape of discount, has been recovered back by the trustees of Wilcoxon, in insolvency.

This we consider a very important circumstance in this case. Surely the appellant never agreed to accept a note for the sum of eleven thousand three hundred dollars, payable six months after date, in payment of the original indebtedness, and make the principal a present of the interest. Is it not, therefore, true that when the appellant was decreed to refund the interest, that avoided that portion of the contract, the same as setting aside the mortgage avoided the other portion? Is not the appellant, the bank, therefore entitled to be restored to its former position.

So strongly did this transaction impress the Circuit Court for Frederick County, that in its opinion indicating the equity case, it said: "Those original notes *uncancelled and unpaid* are here in Court. The sureties on them *have not been prejudiced or injured* (as far as the record discloses) by the execution and delivery of the mortgage, as the mortgage must fall by reason of the inexorable mandate of the statute; though there is no taint or suggestion of fraud in the conduct of the bank, it is only *just and equitable* that the bank should be restored to the position which it held when the mortgage was given, March, 1893. This will injure no one. Should the sureties be obliged to pay the notes they will merely discharge the obligation they voluntarily assumed when they signed them. Whatever loss may fall upon them will be a loss resulting from their own contract and not from any conduct of the bank."

But is the note for the sum of eleven thousand three hundred dollars, executed by William Wilcoxon, with Elizabeth Wilcoxon as surety, according to the contention of appellee, a valid note or contract? For to constitute a novation, the new contract must be a valid one. In every novation there are four essential requisites: First, a previous

valid obligation ; second, the agreement of all the parties to the new contract ; third, the extinguishment of the old contract ; fourth, *the validity of the new one*. *Clark v. Billings*, 59 Ind. 508 ; *Am. & Eng. Ency. of Law*, vol. 16 (Novation), pg. 864, and cases there cited. Where there is a substitution of a new contract for an old one, the new contract must be a valid one, upon which the creditor can have his remedy. *Guichard v. Brande*, 57 Wis. 534 ; *Sprycher v. Werner*, 74 Wis. 456.

In addition, then, to the matters hereinbefore referred to, in considering the validity of the note for \$11,300 made by Wilcoxon and wife, it becomes necessary to consider the validity of the undertaking of Elizabeth Wilcoxon, for if she is not bound under her contract as surety, the note is not "one upon which the creditor can have his remedy." What then was her contract ? Was it not that she signed the note as surety on the condition that the same would be secured by a conveyance to the appellant of certain property by way of mortgage ? This, we submit, was her undertaking, an undertaking of which the payee and appellant at the time had knowledge.

A surety who has contracted to become so on the understanding that he is to be co-surety with another, is wholly released if the intended co-surety does not execute. *Evans v. Blenridge*, 8 DeG. M. & G. 100. If, then, the liability of Elizabeth Wilcoxon was assumed with the full knowledge and understanding on the part of the payee (the appellant bank) and of Wilcoxon, the principal maker, that the said note of William Wilcoxon for the sum of eleven thousand three hundred dollars would be secured by a mortgage conveying certain property, which conveyance would result to her benefit as surety on said note (because it is a well settled principle of law, that any security taken by the principal would revert or belong to the surety on payment of the debt thereby secured by the surety), and this very conveyance of property, which was given to secure this debt, was rendered null and void by operation of law and

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such security thereby lost, would not Elizabeth Wilcoxon, under such circumstances, be discharged from liability, and could the bank maintain an action against her as surety? The inducement for her to become surety on said note having been rendered utterly null and void, how can it be said that she is still liable on the note? If, then, no action can be maintained against her upon the ground that her contract of suretyship has been violated, how can it be successfully maintained that the said note is a novation of the original indebtedness. The appellant therefore insists that Elizabeth Wilcoxon is not bound by her contract of suretyship on the said note.

J. C. Motter and *William P. Maulsby, Jr.*, for the appellee.

At the time the transaction occurred, who doubted but that the note had been fully paid and satisfied, absolutely and unqualifiedly extinguished without further life or vitality. If Michael, the appellee, had gone to the appellant after the 21st day of March, 1893, and asked for the note in question, it would have been promptly explained to him that the note had been paid and delivered up to Wilcoxon; that he was no longer responsible to the appellant on said note, and he would have gone thence with the comforting assurance that he was forever relieved of that heavy financial responsibility. Our brothers contend that it would have been a mere delusion, however. If the new note, as an actual fact, was discounted (the appellant says it was), and a part of the proceeds of that note were applied to the payment of the note in question, and the old note was delivered up as paid (which is admitted by the appellant), it is fully discharged and forever extinguished as against the appellee, and the plea of payment is sustained. *Bank of New Windsor v. Ecker, Executor*, 59 Md. 304-5; *U. S. v. Thompson*, 33 Md. 575; *Compton v. Patterson*, 28 South Carolina, 115.

If there was a valid binding contract made between appellant and Wilcoxon or his wife on March 21st, 1893, the day of extension of note and mortgage for \$11,300, then the

surety, Michael, appellee, was discharged, and the judgment must be affirmed, because such a contract was a variance from the contract appellee made with appellant when he became surety on \$5,000 note, and a variance made without appellee's consent. Appellee had a right to have the letter of his contract with appellant as surety on \$5,000 note observed; a departure from this contract discharged him. 31 Md. 131; 47 Md. 190; 9 Wheaton, 680.

The appellant knew that Wilcoxon was a trader and merchant; he kept his account as such with appellant; the proceeds of this \$5,000 note, when originally discounted for him, had gone into this very account, as also the other notes, the sum of which made up the indebtedness of \$11,300—besides which he carried on business openly and publicly as a merchant and trader in the very town of appellant, having a store within two blocks of appellant's bank. We submit that it knew Wilcoxon was insolvent at date of mortgage, by its own dealings with him. *Knew it*, not suspected or had good reason to believe, but knew it.

Now, with this knowledge of law and fact, what was the contract made March 21st, 1893? We, appellant, will loan you \$11,300, the exact amount owing us by you, upon your giving us two securities, the one your wife as a security on the note; we know you are a trader, that you are insolvent, that the mortgage creates a preference, that this preference is in fraud of insolvent law, that if insolvent proceedings are had in four months, this preference will be set aside, but we equally know, that if no proceedings are had within four months, it will remain good. It is perfectly valid and binding now, and we will take the risk of it remaining good. We get a present lien, we get the chance of it remaining unassailed. This chance we take, this contingency we accept. We submit that this is the fair statement of the contract with the conditions expressed in language which were in law and fact necessarily implied in the contract of March 21st. The mortgage was then made valid

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and binding. It would remain so, unless a contingency happened, viz., unless proceedings in insolvency were had within four months. Whether this contingency would or would not happen, was the risk or chance the appellant took—the chance that it would not happen. “If parties make contracts upon contingencies equally uncertain to both of them, or with equal means of information, upon what grounds can Courts undertake to set them aside?”

But in another view, independently of the foregoing, the contract of March 21st, 1893, extended the time for the payment of the \$5,000 note, superseded the contract made by appellee as surety on this note, by the mortgage of March 21st, and thus discharged the surety. Any extension of time of payment by creditor by valid contract with principal debtor, by which the rights of surety during the time thus extended are suspended, discharges the surety. 64 New York, 457. Of course the reason is plain; anything which prevents the right of surety to protect himself, done by creditor, violates the contract made between creditor and surety and discharges surety. “Any dealings with the principal debtor by the creditor, which amount to a departure from the contract by which the surety is to be bound and which by possibility might materially vary or enlarge the latter’s liability without his assent, discharges the surety.” *Mayhew v. Boyd*, 5 Md. 102.

And if we are wrong in this contention that the mortgage conveyed the potential dower right of Mrs. Wilcoxon, which was a sufficient consideration for the contract for the 6 months extension given in mortgage, if we are wrong in all this, we submit that, besides and outside the mortgage the appellant received in the contract of March 21st full consideration to support the contract; that the same was a valid and binding one; and if so, that the surety, appellee, was discharged. What did appellant receive? He got two securities for his debt; the one the liability of Mrs. Wilcoxon, the other the mortgage. These were the very securities he asked, with the taking of which

appellee had nothing to do ; one of the securities, the mortgage, upon the hypothesis of this view, fails, is void from the beginning, but the other one, Mrs. Wilcoxon, is not void. She remains liable ; the appellant has a note for \$11,3000 with one security who is bound. Can this be denied? Surely the note is not a preference ; the note is but the sum of the old debt. So far as the creditors of insolvent are concerned, they are no worse off for the \$11,300 note than before it was made, the preference has been avoided, viz., the mortgage, but the note is in full force. Mrs. Wilcoxon is not asking to be relieved from the note ; the appellant, who took her as the surety, asks it ; but why ? upon what ground ? She was not a necessary party to the note, even though a desirable one to the mortgage, yet they took her. She was and is for any reason that we have heard suggested bound by her position as surety on the note. There has been no bill filed by the trustees in insolvency asking to have note declared null. So far as the law goes, we submit the note is in full force and vigor, a legal, binding obligation.

ROBERTS, J., delivered the opinion of the Court.

The record of this appeal contains three exceptions, two of which relate to the admissibility of the proof offered, and one to the rulings of the Court below in rejecting the prayers of the plaintiff, and granting that of the defendant. The questions are interesting and important, not only on account of the large sum involved, as of the principles of law invoked, and which we are now called upon to consider and apply. This is an action brought upon a promissory note in the Circuit Court for Frederick County. The note sued upon is as follows :

\$5,000.00. "FREDERICK, MD., Aug. 4th, 1892.

Six months after date we jointly and severally promise to pay to the order of the Frederick-Town Savings Institution, five thousand dollars for value received, negotiable and payable at the Frederick-Town Savings Institution. Wm. Wilcoxon, Andrew J. Wilcoxon, John L. Michael."

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The principal question in the case arises on the issue taken on the replication to the second plea. The plea states that William Wilcoxon, the principal in said note, satisfied and discharged the same by payment before suit brought thereon. It is not, however, a technical question of pleading which we are called upon to decide. The material inquiry is, did said Wilcoxon satisfy and discharge said note by payment *in such manner* as to relieve the appellee, Michael, from further liability as surety thereon. This is the plain issue presented and which we are now to determine. The facts shown by the record, touching the question of payment pleaded by the appellee, are that the appellant bank was, on the 21st of March, 1893, the holder of four notes of said Wilcoxon and sureties variously dated, and for various sums, and which together aggregated the sum of \$11,300. The note sued on was one of the four making up said last mentioned sum. Being thus indebted and repeatedly pressed by the appellant for additional security to that then held by it, Wilcoxon and wife agreed to give to the appellant their note for the sum of \$11,300.00, secured by mortgage on his real estate. This offer was accepted by the appellant without qualification or condition. The mortgage was thereupon executed and delivered to the appellant, and the new note then discounted by it. From the proceeds of the said new note the indebtedness of said Wilcoxon, evidenced by said four notes, was paid and the same were then delivered by the appellant to said Wilcoxon. Within four months after the execution of said mortgage Wilcoxon applied for the benefit of the insolvent law of the State of Maryland, and was adjudged to be insolvent. Trustees having been selected, under the provisions of the law, they filed, with the sanction of the Court, a bill in equity, to set aside said mortgage, as giving to the appellant a fraudulent preference under the provisions of the insolvent laws. Wilcoxon being a merchant or trader, and found to be insolvent at the time of the execution and delivery of the mortgage, the Court decreed it to be an unlawful pref-

erence and struck down the same. An important question arises here as to the effect resulting from depriving said mortgage of its character as a legal preference. It is contended by the appellant that the action of the Court in the insolvency proceedings not only deprived said mortgage of its quality as a lien or preference in the distribution of the assets of the insolvent estate of Wilcoxon, but that such action extinguished the *liability of the surety* in said note, for the payment of which the mortgage was given to secure. We have been referred to many cases touching the liability of sureties as to what constitutes payment and what does not, and we fully concur in the doctrine announced thereon. This, however, is not a case where in the renewal of a note the signature of the surety has been subsequently ascertained to be a forgery. In such a case, the renewal is invalid, and does not operate as a payment of the original note; nor does it effect an extinguishment of the right of action thereon. This is the almost universal concession of the declared doctrine of the Courts in England and in this country. There is, however, but small analogy between the case of a forged signature to a note and the case now under consideration. In the one instance, as far as the surety is concerned, the note is a nullity; in the other, which is the case now before us, we have a mortgage given to secure a perfectly valid note, but in consequence of the provisions of the insolvent law, the mortgage is not allowed to stand as a legal preference in the appellant's favor in the distribution of the assets of the insolvent estate, *only, however, because* it has been executed and recorded within the inhibited period contained in the statute. This view of the law in no sense contravenes the doctrine of the cases of *Goodrich v. Trucy*, 43 Vt. 314; *Markle v. Hatfield*, 2 Johns. 455; *Eagle Bank v. Smith*, 5 Conn. 71.

This case was, by agreement of counsel, tried before the Court below without the intervention of a jury. The facts contained in the record are fully and satisfactorily stated by the reporter in his notes placed at the head of

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this case. The first exception taken by the appellant relates to the admissibility in evidence of the record of proceedings in equity cause No. 6128, on the docket of the Circuit Court for Frederick County, to which the appellee was not a party, and in no wise concluded from making in this action any defense which he had the legal right to interpose. This exception brings up for consideration the primary and leading question on this appeal: Has the appellee, by the action of Wilcoxon, been discharged of liability as surety on the note sued upon?

It will be necessary to consider, in the first place, the legal attributes of the joint note of Wilcoxon and wife for the sum of \$11,300, which the appellant discounted for the purpose of paying the four notes of Wilcoxon and sureties, at the time held by the appellant, and which were delivered to Wilcoxon when the note of himself and wife had passed to the possession of the appellant. We may have occasion later on to examine some of the consequences attending the execution of the mortgage. But let us inquire as to the legal status of the note of Wilcoxon and wife, after the mortgage had been declared an illegal and fraudulent preference. It was not a necessary incident to the execution of a valid mortgage, that a note of any kind should have been given. The mortgage would have been equally valid without it, and if given, it was only collateral to the note, and the wife was in no sense a necessary party to the note. The almost universal practice in this State has been for the wife to join with her husband in the execution of the mortgage, for the *sole* purpose of releasing and conveying her potential right of dower; but to the accomplishment of this purpose it was in no respect essential that she should join in the making of the note. Since the passage of the Act of 1872, ch. 270, (Code, Art. 45, sec. 2), by which the wife is authorized jointly with her husband to contract in writing on any note, bill of exchange, &c., there is a manifest object to be obtained in having the wife join in the note as well as the mortgage, especially if she be seized or possessed of property.

As already stated, the appellant was urging upon Wilcoxon to give *additional security* for the notes which were already in the possession of the bank, and yet, as soon as the new note and mortgage were delivered to the bank, it voluntarily surrendered to Wilcoxon the four notes on which he was originally indebted.

Is it not a reasonable inference that the appellant was sufficiently well satisfied with the character of the new security which it had taken in payment of the original indebtedness of Wilcoxon on said four notes as to cause it, of its own motion, and not otherwise, to part with the possession of the four notes by delivering up the same to Wilcoxon, so that the new note and mortgage were in no just sense additional security? But there is another suggestive fact in the record which the testimony makes clear, and that is, the appellant cannot, under the circumstances of the case, justly claim to have been without notice of the financial status of Wilcoxon, and his liability to be declared an insolvent within four months of the execution of the mortgage. The appellant had in its possession at that time, four notes, covering an indebtedness of \$11,300, and each of said notes was for money borrowed by Wilcoxon during the year 1892. These notes, or most of them, had been renewed from time to time and were long past due, yet Wilcoxon had not, to the 21st of March, 1893, the date of said mortgage, paid one farthing in discharge of the principal sums constituting his indebtedness on said notes. The doctrine is well recognized that insolvency may be inferred from the circumstances surrounding a transaction. If the appellant knew that Wilcoxon was a trader and indebted to it in the sum of \$11,300, and that he had for nearly two years failed to pay his notes at maturity, in the ordinary course of business, and further knew that he had, within four months of the execution of the mortgage, suspended payment of his negotiable paper, and had failed to resume payment thereof within twenty days thereafter, did not these circumstances constitute reasonable cause from which the bank was justi-

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fied in believing that Wilcoxon's business credit and pecuniary standing were bad, and such as would warrant the belief on the part of the bank that if it accepted a mortgage from him to secure itself, he would be liable to be proceeded against under the provisions of the insolvent laws? If with knowledge of the facts recited, and we cannot escape the conviction based upon the testimony in the record, that the appellant had such knowledge, it then delivered up the four original notes to Wilcoxon, the appellant has taken a venture, the consequences of which it must accept. We are, after careful consideration, unable to lend our sanction to the theory advanced, that in striking down the mortgage as a fraudulent preference under our insolvent laws, the note, which the mortgage was given to secure, must also abide the same result. We do not think, upon principle or authority, that any such conclusion follows from the premises stated. In *Allers v. Forbes*, 59 Md. 376, which was an action brought by Forbes against Allers and wife to recover on three promissory notes signed by them as joint makers, the husband pleaded in his own behalf, that he had been discharged under the insolvent laws, and for a further plea the defendant and wife pleaded "that by the discharge of the husband, they were jointly and severally discharged from all liability on account of said notes." JUDGE MILLER, delivering the opinion of this Court, said: "We can discover no possible reason why the discharge of her husband under the insolvent laws should release her and her property. Her property does not pass to his trustee, nor are her rights therein in any way affected by his insolvency. The statute makes her stand, with respect to the obligations so signed by her, in the same position as any other party so signing them would stand." The same conclusion was reached by VICE CHANCELLOR HALL on a similar state of facts in construing the English married woman's property Act of 1870, in the case of *Davies v. Jenkins*, L. R., 6 Chancery Division, 728. We have referred to these cases with but one purpose in view, and that is to

ascertain the legal status of the wife, as affected by her husband's insolvency, in a case like the present, where she has jointly with her husband executed a note.

There is nothing in the record to show whether Mrs. Wilcoxon is possessed of property or not, and there can be no just reason assigned why the appellant should be deprived of its indisputable right to proceed against her. If it had been the intention of the parties to controvert the responsibility of Mrs. Wilcoxon as surety on said note, it was their privilege to have done so at the trial below. But this they did not do, and without indulging in speculation as to her financial ability or looking to the consequences, as they may affect either party to this cause, we must apply the law as we find it. It is well-established law in this State, that a married woman is competent to become surety on a note which she has signed jointly with her husband, and it is wholly immaterial whether she has separate property or not. In some of the States where the laws relating to married women have undergone changes of like character with our own, there have been well-considered decisions of the Courts of those States holding *femmes covert* liable to the same extent announced by this Court. It has been argued that the note is void as against the wife, because there is no consideration to bind her. A different view is, however, taken by CHIEF JUSTICE GRAY, who delivered the opinion of the Court in *Major v. Holmes*, 124 Mass. 108. He says: "Before the statute of 1874, ch. 184, the female defendant would not have been liable in either of those cases, because contracts could only be made by a married woman in reference to her separate property, business or earnings. But this statute has removed that restriction and in the broadest terms enables a married woman to make contracts, oral and written, sealed and unsealed, in the same manner as if she were *sole*, and does not require that the consideration of her contracts should enure to her own benefit." We have given careful examination and consideration to the questions presented by this appeal,

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and finding no error in the rulings of the Court below, we must affirm the same.

Judgment affirmed with costs.

(Decided June 19th, 1895.)

McSHERRY, J., delivered the following dissenting opinion, in which BRYAN and BRISCOE, JJ., concur:

In March, 1893, Wilcoxon was indebted to the Frederick-Town Savings Institution in the sum of eleven thousand three hundred dollars on four promissory notes, of which two were overdue and two had not yet matured. There were sureties upon each of these notes. Failing, after considerable pressure brought to bear by the bank, to give additional security, Wilcoxon finally agreed to execute and the bank consented to accept a mortgage upon Wilcoxon's real estate to secure the entire indebtedness. Accordingly, a new note for eleven thousand three hundred dollars, the total amount he owed the bank, and a mortgage of even date securing that note were executed by Wilcoxon and wife and delivered to the bank; the accrued interest and discount for six months in advance were paid and the bank returned to Wilcoxon the four promissory notes evidencing the original indebtedness. The precise mode pursued in accomplishing this arrangement was as follows: The note for eleven thousand three hundred dollars, signed by Wilcoxon and wife, was apparently discounted, and the proceeds were apparently carried to his credit in his account with the bank. Against this seeming, but not real credit, he drew his check for the face amount of the four notes, with accrued interest and discount in advance on the new note, and that check was then charged up against the fictitious credit simultaneously entered. No

actual money passed from the bank to Wilcoxon, or from Wilcoxon to the bank, and none could have been drawn on the faith of this alleged credit; but the whole transaction was effected by a system of interledgering entries, intended to create the impression that it was an entirely new discount, disconnected from the antecedent indebtedness, and after all the entries had been made nothing had been substantially accomplished but the substitution of a new note, *and* a mortgage for the four original notes. Shortly after this transaction had been completed, Wilcoxon, who was a trader, made a voluntary application for the benefit of the insolvent laws, and in due season his creditors elected permanent trustees, in the method prescribed by the Code. The trustees, within four months after the date of the mortgage, filed a bill in equity against the bank, alleging that the mortgage was a prohibited preference, and praying that it be cancelled and annulled. After a hearing the Circuit Court for Frederick County passed a decree vacating and setting aside the mortgage, upon the ground that it was a preference given by a trader and accepted by his creditor, contrary to the provisions of the insolvent law; and it was further decreed that the four original promissory notes on file in the office of the Clerk as a part of the evidence in the then pending cause, be returned to the bank. Thereafter the bank brought suit against Wilcoxon and Michael upon one of the four promissory notes which constituted the evidence of the original indebtedness to the bank. To the *narr*, which declared on a promissory note for five thousand dollars, Michael in reality a surety, but ostensibly one of the joint makers of the note, pleaded, first, that he never promised as alleged; and secondly, that before suit was brought Wilcoxon satisfied and discharged the note by payment. There are three bills of exception in the record, and from the final judgment, which was entered *pro forma* for the defendant, the bank has taken this appeal. The first exception was taken to the ruling refusing to admit in evidence the bill, answer and decree in

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the case instituted by the permanent trustees to annul the mortgage ; the second was reserved because of the ruling refusing to allow the plaintiff to show that the note sued on had been delivered back to the bank by the Clerk pursuant to the decree, and the third was taken to the ruling of the Court upon the prayers—the prayer of the plaintiff, insisting that under the facts stated, it was entitled to recover, having been rejected and that of the defendant, being the direct converse, having been granted.

The question, then, which, it seems to me, lies at the very root of the controversy is, was there a payment of this note by Wilcoxon under the circumstances stated, and by the method above set forth? If there was not, then clearly, under the issue joined on the second plea, the plaintiff was entitled to recover. If there was a payment, then, of course, the debt was extinguished and the liability of Michael was at an end.

It must be borne in mind that the signatures to the note were not denied by the pleadings, and are, therefore, under Art. 75, sec. 23, sub-sec. 108 of the Code, admitted ; and hence the mere production of the note made out a *prima facie* case which, unless rebutted, entitled the plaintiff to recover. The defendant having pleaded payment and having thus set up new matter by way of defence had, according to settled rules of pleading and practice, the burden cast upon him to show affirmatively by evidence the truth of the facts asserted in the plea ; and this included, as an integral part of the defence relied on, proof as to how and by what means the alleged payment had been made. Payment cannot be proved without at the same time showing how it was made. The method of payment is inseparable from the *fact* of payment, because the fact as to whether a payment has been made can only appear when the method by which it is alleged to have been made is disclosed. Now, if under the circumstances stated there was a payment, how was it made ? Was the debt evidenced by the five thousand dollar note sued on paid with money, or was it paid by the substitution

of another and a different obligation ; that is to say, was there a novation ? It is not pretended by any one that the note was paid with *money*—no suggestion of that kind is to be found in the record or was made in the argument at bar—and therefore if there was any payment at all it must have been and could only have been by a novation. If made by the latter means, then what was the obligation or new debt substituted for and accepted in lieu of and as discharging the original indebtedness ? Was it the *note* of Wilcoxon and wife, with a collateral mortgage as a mere separable and divisible incident, or was it the note of Wilcoxon and wife *and* a mortgage of even date securing it, both forming and intended to form one entire consideration ? There is not the faintest intimation in the record to show that the bank and Wilcoxon agreed to substitute, or ever thought of considering, a new note of the debtor and his wife as a substantive payment of the four promissory notes, upon all of which there were personal securities. There can be no possible pretext that such an understanding or anything resembling it was proposed, much less accepted. There being nothing whatever in the record to show this, it cannot be assumed. The burden of proving such an agreement rests upon the defendant ; the presumption of the law being that the note was taken as conditional payment only. *Haines & Eppley v. Pearce*, 41 Md. 221. There is consequently but one remaining contingency, and it is that the five thousand dollar note was paid, if paid at all, by the new note and the mortgage, both together constituting one entire novation, and not separate novations, of the original debt. To this complexion the contention must inevitably, by the simplest process of exclusion, ultimately come. If, then, the note *and* the mortgage together constituted the consideration for the surrender of the five thousand dollar note by the bank, and the mortgage has been stricken down because it was an unlawful preference, and therefore because it was such a mortgage as Wilcoxon could not lawfully give, and the bank has lost the benefit of the security the whole transaction

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was intended to provide, has there still been a payment which extinguished the debt and satisfied the note signed by Michael? If it be conceded, as it must be, that both the note and the mortgage, by the agreement of the bank and Wilcoxon, made up and were to constitute a payment of the note sued on, then when one of these two constituent mediums of payment has proved valueless by reason of matters subsequently intervening but in reality existing at the date of, and inhering in, the mortgage, it is obvious that the other and remaining one cannot alone be treated as payment, unless the Court makes a new contract of novation for the parties that they did not see fit to make for themselves. This, of course, cannot be done. The bank was entitled to get and to retain all that it contracted for, not a mere fraction of it, before it can be held to the terms of its co-relative and dependent agreement to fully and finally surrender and extinguish the antecedent notes. This is so far fundamentally true as to be axiomatic and therefore incapable of demonstration. To constitute a novation which will discharge the original debtor and render a third person liable for the debt, there must be the substitution of a new obligation for the old one, and the new contract must be a valid one upon which the creditor can maintain his remedy. *Spycher v. Uerner*, 5 L. R. A. 414.

It is by no means an answer to say, that when the mortgage was taken the bank was bound to know that the lien created thereby would not prevail if attacked under the insolvent law, for the provisions of that law were as much an integral part of the mortgage as though they had been written at large therein. With those provisions, therefore, in the minds of the parties, as in contemplation of law they were in the body of the mortgage, it is not to be concluded, for there are no premises to justify it, that either the mortgagor or mortgagee contemplated the contingency would arise which would destroy the mortgage altogether; and hence, the only tenable inference is that both the bank and Wilcoxon supposed when the negotiations were made and

closed, that the mortgage was, and would continue to be, perfectly valid and effective, as it would undoubtedly have been had no insolvency proceedings intervened, and had no assault been made on it within the four months prescribed by the statute. "Upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good." *Roberts v. Fisher*, 43 N. Y. 161. And this doctrine runs through the differing phases of many adjudged cases. Thus, in *Bemhisel v. Firman, Assignee*, 22 Wall. 170, where a security founded on a prior one was tainted with usury, and the prior one was free from it, but had been given up and cancelled in exchange for the tainted one, and the latter was thereafter adjudged void because of the usury, it was held that the prior or cancelled one was revived and could be enforced as though the invalid one had never been given. And the Court cites *Parker v. Cousins*, 2 Gratt. 389; *Bank v. Joslyn*, 37 N. Y. 353; *Cook v. Barnes*, 38 N. Y. 521; *Rice v. Welling*, 5 Wend. 595. So where payments have been made in counterfeit money the debt has always been treated as still due and subsisting. *First Nat. Bk. of Athens v. Buchanan et al.*, 1 L. R. A. 199, and numerous cases cited in the note. In *Petty v. Cook*, L. R. 6 Q. B. 790, the payee of a promissory note made by a principal and a surety accepted the amount thereof from the principal, in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors, the trustee under the deed avoided the payment as a fraudulent preference, and the payee returned the amount to the trustee. Then the payee brought suit against the surety on the note, and the surety pleaded, just as he has done in the case at bar, that the principal had satisfied and discharged the claim by payment. But it was held by BLACKBURN, LUSH and HANNAN, JJ., that the payment did not operate as a satisfaction of the debt, and that the acceptance of the money from the principal by the payee was not an act done against

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the faith of the contract with the surety so as to discharge him. And in *Pritchard v. Hitchcock*, 6 M. & G. (46 E. C. L. R.) 151, it appeared that A had guaranteed the payment to B of two bills of exchange accepted by C. C afterwards handed over the amount of the bills to B. This was apparently a payment, and was intended to be, but a *fiat* having issued against C, his assignees in an action for money had and received recovered the money back from B as having been paid by way of fraudulent preference, just as the mortgage in the pending case was stricken down because it was a prohibited preference. Then B, the creditor, brought suit against A, the guarantor, upon the guaranty, and A pleaded that C, the debtor, had paid, and B, the creditor, had received the money in satisfaction of the bills, which allegation was traversed by the replication. It was held that the payment did not amount to a payment in satisfaction. TINDAL, C. J., observed: "Of the fact of money being passed as a payment there can be no doubt, but I think that the plaintiff was at liberty to show that what appeared at the time to be a good and satisfactory payment, was perfectly illusory; that the money which he had received from W. Hitchcock could not be appropriated by him to his own use, but that it belonged to the assignees." The two cases last cited differ from the one at bar only in the single fact that the payment pleaded was made with money, whilst here it was made with a note and mortgage. In both *Pretty v. Cook* and *Pritchard v. Hitchcock*, the original evidences of indebtedness had been surrendered up upon the payments being made; the payments would have been good but for the intervening insolvency of the debtors, and the sureties were sued on the original contracts, after the money paid by the principal debtors had been recovered back by the assignees, because the payments, were, when made, fraudulent preferences. Notwithstanding all this, the sureties were held not to have been discharged by these illusory payments. Wherein is there the slightest difference in principle between those cases and the one at bar?

But without searching for merely parallel cases, which are valuable chiefly as illustrations of the application of established legal principles, what is the ultimate principle which underlies, and necessarily underlies, all adjudications of the class alluded to, wherein the surety bases his defence on the plea that the principal paid the debt, and the creditor insists that the payment was wholly illusory? Obviously it is, that upon the failure of the alleged payment to become an effective and a real satisfaction of the debt, by reason of some supervening legal impediment, the debt remains unextinguished; and the attempted, but abortive payment, not being an act against the faith of the contract with the surety, in no way affects his liability, and consequently does not discharge him. The surety, at the time of taking upon himself his liability, contracts that the creditor shall receive valid payment of his claim against the principal debtor. If there is no valid payment the contract of the surety remains unfulfilled, and the surety is not discharged, because what he contracted should be done has not been done. A payment which at the time it is made contains the seeds of avoidance and is subsequently avoided, is not a valid payment, and hence does not operate to release the surety. And is not that precisely the condition of the case at bar?

Now, all pretence of a payment in money being eliminated, there are two reasons why there was no payment made at all: First, there was no payment, because if the note *and* the mortgage were both intended by the parties to the transaction to constitute payment and a part of the agreed medium of payment, the mortgage, has failed to be available by reason of inherent infirmities; then the bank did not get the security it contracted to get, and it obviously cannot be treated as holding towards the surety the relation that it would have been forced to assume had it secured what it contracted for and what Wilcoxon undertook to give it. And secondly, because there is no pretence that the bank agreed to rely solely on the *note* of Wilcoxon and wife as in itself a payment of the antecedent indebtedness.

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The law is perfectly well settled in this State that the mere receipt of a security of equal or inferior degree to that evidencing the original debt, will never operate as a payment of the latter. There must be, in addition, proof that the new bill or note was accepted by the creditor under an agreement that he would run the risk of its being paid, and would look exclusively to it for satisfaction. *Md. & N. Y. Coal Co. v. Wingert*, 8 Gill, 171; *Hoopes v. Strasberger*, 37 Md. 390. And the burden of proving such an agreement is on the party asserting it; the presumptions are all against its existence. *Haines & Epply v. Pearce, supra*. There is not the most indistinct shadow of evidence, nor is it even pretended, that the bank took the note of Wilcoxon and wife under an agreement, either express or implied, to run the risk of its payment, or to look to it alone, apart from the mortgage, in settlement of the promissory notes or either of them. Consequently, there is wanting one of the essential requisites to show a payment by the *note* alone. Even if the note, separated from the mortgage, continues to have any validity, it could not be treated as a payment, because there is no evidence whatever that it was agreed to be so considered or treated.

But beyond this, when the mortgage fell the note fell with it. The note of Wilcoxon and wife was but a part of the transaction, and a very subordinate and wholly unnecessary part, and was never intended to stand alone or severed from the mortgage. It was the accidental and not the essential feature of the arrangement; and to hold that it survived the wreck of the mortgage and constitutes by itself a payment of the note sued on, is to make the accessory serve the purpose designed originally to be accomplished by the principal—is to convert the subsidiary into the substantial term of the contract of novation or payment. Such a conclusion would hold the wife absolutely bound on the note though she signed it on the condition that it was to be secured by a mortgage on her husband's property. Being a mere surety herself, as all the facts uncontestedly show,

she was entitled to the benefit of all the securities held by the creditor, and it may well be questioned whether she could be held liable at all on the note, even if it did not fall with the mortgage, if she signed it and the bank accepted it upon the express condition that it was to be secured by a mortgage which afterwards turned out to be invalid. The very condition upon which the delivery and acceptance of the note depended failed; that is to say, the mortgage which was to secure it was inoperative; and the condition failing, the note was no longer enforceable, and not being enforceable it was utterly without value in the hands of the bank and consequently inoperative as a payment at all.

I think there was no error in the first and second exceptions, of which the appellant can complain. The production of the note sued on and the signatures to which were undisputed, made out the plaintiff's case; there was no evidence adduced tending to show payment, and the plaintiff was not required to prove the negative of the defendant's plea. Hence the proposed evidence which only tended to prove that negative was immaterial.

There was error, it seems to me, in rejecting the plaintiff's and in granting the defendant's prayers. The latter, besides being wrong in principle was entirely too general, and if for no other reason ought to have been rejected on that account. In my opinion the *pro forma* judgment ought to be reversed and judgment ought to be entered for the appellant.

•(Filed June 19th, 1895.)

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MARION DE KALB SMITH, COMPTROLLER OF THE TREASURY OF MARYLAND, *vs.* THE COUNTY SCHOOL COMMISSIONERS OF DORCHESTER COUNTY.

Oyster Law—County Scraping Licenses—Repeal of Statute by Implication.

The rule that if two statutes are plainly repugnant to each other, the later Act operates to the extent of the repugnancy as a repeal of the first, applies also to different sections of the same law.

Under the Act of 1894, ch. 380, the Clerks of the Circuit Courts of the counties are required to pay to the Comptroller of the Treasury one-third of the amount received for permits to take oysters under scraping licenses, and not one-half of said amount.

The Act of 1894, ch. 380, sec. 29, provides that *one-third* of the money received from the county oyster scraping licenses shall be paid into the Treasury of the State and placed to the credit of the "Oyster Fund." Section 30 of said Act provides that all licenses not used shall be returned by the Clerks of the Courts to the Comptroller, and the said Clerks shall also pay to the Comptroller *one-half* of all moneys received for *such licenses*, which sum shall be paid to the credit of the "Oyster Fund." *Held*, that the language of section 30 is too vague to repeal by implication the express provision of section 29, and that upon the whole Act the intention of the Legislature appeared to be that *one-third* of the county scraping licenses should be paid into the State Treasury.

Appeal from a decree of the Circuit Court for Dorchester County (PAGE, C. J., HOLLAND and LLOYD, JJ.) enjoining the Clerk of the Circuit Court for that county from paying into the Treasury of the State more than one-third of the money received by him for licenses issued under Code Public Local Laws, Art. 10, sec. 260. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE and BOYD, JJ.

John Prentiss Poe, Attorney-General, for the appellant.
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Sewell T. Milbourne, for the appellees.

BOYD, J., delivered the opinion of the Court.

The question in this case is whether the Clerk of the Circuit Court for Dorchester County shall pay to the Comptroller of the State *one-third* or *one-half* of all moneys received by him from what are called county scraping licenses to take oysters.

Under the Local Laws of that county the Clerk is authorized to issue licenses to residents of the county to employ their boats of a designated capacity in taking or catching oysters with scrapes or dredges in certain defined waters. By sec. 260 of Art. 10 of the Local Code, the School Commissioners of Dorchester County were required to furnish the Clerk with the requisite number of blank licenses, and the Clerk was required, at the end of the season, to return to the School Commissioners the licenses not issued, and to pay the license money into the public school fund of the county after deducting a fee of fifty cents for each license issued.

The general oyster laws of the State, as embodied in Art. 72 of the Code of Public General Laws, authorized certain licenses to be issued for the benefit of the State, but did not originally require any portion of the money received from the county scraping licenses to be paid to the State.

By chap. 380 of the Laws of 1894, the Legislature repealed Art. 72 of the Code of Public General Laws and re-enacted the same with amendments. Apparently conflicting provisions in sections 29 and 30 of that Article, as amended, have caused the difficulty in this case. Section 29 provides that "all moneys received or obtained from dredging licenses, issued under the provisions of the preceding sections of this Article, and *one-third of the moneys received from the county scraping licenses*, and all fines, penalties or forfeitures imposed in pursuance thereof, shall, upon the warrant of the Comptroller, be paid into the treasury and placed to the credit of a fund which shall be

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called "*The Oyster Fund*," and the same shall be kept separate and distinct from other funds in the treasury," etc. It then goes on to provide, that this fund should only be used for the protection of fish and oysters in Maryland waters, the maintenance of the State Fishery Force, etc. The Comptroller is required to make a special statement in his annual report of the receipts and expenditures on account of said funds. Section 30 requires the Comptroller to furnish two sets of numbers corresponding with the licenses to catch oysters with scoop, scrape, dredge or any other similar instrument, to persons taking out such licenses. The size of numbers and places where they are to be put are mentioned with great particularity, and severe penalties are provided for the violation of any of the provisions of this section. Thus far the section corresponds with section 12 of Article 72 of the Code, and then adds the following : "The provisions of this section shall apply to all boats licensed to take oysters with scrape or scoop by any county in this State, except that the numbers for such boats shall be painted red instead of black, and the numbers shall be delivered by the Comptroller to the Clerks of the Court as they may be ordered, and at the end of the season all licenses not used shall be returned by said Clerks to the Comptroller ; and the said Clerks shall also pay to the Comptroller one-half of all moneys received by him for such licenses, which sum *shall be paid to the credit of the oyster fund.*"

It will be observed that by section 29 *one-third* of the money received from the county scraping licenses is to be paid into the State Treasury and placed to the credit of the oyster fund. If that stood alone there could be no question as to what proportion of the amount received from these licenses should be paid to the State. But it is contended that section 30 provides that *one-half* shall be paid to the State, and that inasmuch as it is subsequent to section 29 it must prevail. "The general doctrine on the subject of implied repeals is that where there are two Acts on

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the same subject, both are to be given effect if possible. If, however, the two Acts are plainly repugnant to each other in any of their provisions, the latter Act, without any repealing clause, will operate to the extent of the repugnancy, as a repeal of the first." *Tax cases*, 50 Md. 296. This also applies to different sections of the same law. *Harrington v. Rochester*, 10 Wend. 553; *State v. Shelby County*, 36 Ohio St. 326; *Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 211. If, however, it is manifest from the whole act that the Legislature intended the prior section to remain in force, then such intention must govern.

But is section 30 "clearly repugnant" to section 29? It is true that it says the Clerks shall pay to the Comptroller one-half of all moneys received by them from "such licenses." But what licenses? The only prior use of the word "licenses" in this section is in the clause immediately preceding, which says, "and at the end of the season *all licenses not used* shall be returned by said Clerks to the Comptroller." It is perfectly manifest that the Clerks will not receive any money from *licenses not used*, and hence it is apparent that there is an error of some kind in this section. It is said on the part of the appellant that we should give the language such a construction as would prevent it from being meaningless, and hence we should construe the section to mean that the Clerk shall pay over *one-half* of all moneys received from *licenses that were issued*. To do that we must assume that the Legislature meant to say something other than what it did say, and if that be so, can we be certain that it intended to require the Clerk to pay to the State *one-half* of the money received from these licenses for the use of the oyster fund when it had just said in a preceding section that *one-third* should be so paid? In order to determine that section 30 repeals section 29, so far as the question involved in this controversy is concerned, we must give it a meaning different from the language used and contrary to its grammatical construction. Section 260 of Article 10 of the Local Code directed the Clerk of Dorches-

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ter County to pay *all the money* received from these licenses to the public school fund. Section 29 of Art. 72 of the Code of Public General Laws as amended by the Act of 1894, repealed it by implication to the extent of requiring one-third of the money to be paid to the State, and the appellant contends that section 29 should be construed to be further amended by a section which admittedly does not apply to it, unless the construction is changed. Whilst, therefore, we think that the general principles of the rules of construction of statutes are as contended for by the appellant, yet it is clear that one section of an Article of the Code should not be held to be repealed by the section immediately succeeding it, when both were passed at the same time, unless the language of the latter is so clear and definite as to leave no room to question the intention of the Legislature.

Then, again, so far as the Act itself reflects on the intention of the Legislature, it would seem to point to section 29, as the one expressing the legislative intent on this subject. Sections 2 and 4 give the State only one-third of the money received from tonging licenses, which are issued by the State, and it is not probable that the Legislature intended to give the State one-half of the proceeds of licenses issued by the counties—especially when it would be taken from the public school fund. Sections 66 and 67 A, which of course are subsequent to section 30, require the moneys received from the licenses mentioned in them to be placed to the credit of the oyster fund, as provided by section twenty-nine. Thus showing that when the members of the Legislature reached section 66 and 67 A, they had in mind, *had before them*, section 29, which, as we have said, clearly stated that *one-third* of the proceeds of the county scraping licenses was to be placed to the credit of the oyster fund, and they could not have supposed or intended that *one-half* was to be so placed when they had the plain declaration to the contrary before them.

We are therefore of the opinion that the language of section 30 is too vague and indefinite to justify us in saying

that it by implication repeals section 29, and, moreover, the whole Act shows that the will of the Legislature, as far as it can be gathered, was expressed by section 29. The decree of the Court below must be affirmed.

*Decree affirmed with costs to the
appellee.*

(Decided June 20th, 1895.)

WILLIAM F. OWENS *vs.* EDWARD R. OWENS.

Malicious Prosecution—Testimony of Foreman of Grand Jury—Certificate by Trial Judge as to Testimony not Contained in Bill of Exceptions.

In an action for malicious prosecution, it was held upon the facts that the evidence was sufficient to authorize the jury to find that the defendant caused the plaintiff's arrest, that the same was without probable cause and malicious, and that the prosecution was at an end.

In such action, when, in order to show the end of the prosecution, the foreman of the grand jury has testified that the case against the plaintiff was dismissed, it is not competent to ask him on cross-examination why it was dismissed, for the purpose of showing that the prosecution was abandoned at the instance of the defendant. Different reasons may have influenced different grand jurors, and in most cases they should not be permitted to assign reasons for their actions.

In an action for malicious prosecution, evidence that after the arrest and imprisonment of the plaintiff, efforts were made by the defendant to have the prosecution dismissed is not admissible, either in bar of the suit or in mitigation of damages.

The certificate of the trial Judge, contained in the record, as to what was proved at the trial, will be considered on appeal, although not embodied in a bill of exception, when such certificate refers to the matter of the exception.

An exception was taken to the action of the trial Court in rejecting certain evidence. Subsequently this fact was proved in the case by

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another witness, and it was so stated in a certificate of the trial Judge filed the same day as the bill of exception. *Held*, that such certificate would be considered on appeal in connection with the exception.

Appeal from the Circuit Court for Anne Arundel County. The case is stated in the opinion of the Court. The jury rendered a verdict for the plaintiff assessing his damages at \$1,700. The certificate referred to in the opinion of the Court is as follows :

"Memorandum to be inserted in the record following the exceptions: At the request of the plaintiff, through his counsel, it is further certified, that after the evidence embraced in the foregoing exceptions and after the rejection of the defendant's prayer, contained in the 5th exception, the defendant proceeded to examine witnesses on his behalf and the defendant himself testified in his own behalf, and in the course of his testimony testified to the fact that he went before the grand jury at the October term, 1892, (spoken of by the witness, Henry M. Murray, foreman of the grand jury), and stated to said jury that he abandoned the said charge against his brother, this fact the plaintiff asks to have inserted for the reason that even assuming that the Court were wrong in excluding the testimony which the defendant proposed to offer by the witness Murray, yet still no injury was done the defendant by such exclusion, inasmuch as by his own testimony he got before the jury substantially the reason why the grand jury dismissed the charge.

" It is also by the same request further certified, that after the evidence on both sides was closed, certain prayers for instructions to the jury were offered by both parties, those of the defendant (conceded by the plaintiff and granted by the Court) distinctly placing upon the plaintiff the burden of proof of showing the want of probable cause for the said prosecution of the plaintiff by the defendant. The Court not being fully satisfied of the propriety of the practice of certifying to anything taking place during the trial subsequently to the taking of the exceptions—yet, so as to

do no possible harm to the plaintiff, this certificate is signed to avail as it may, and leaving to the Court of Appeals to determine upon the question of the right to so certify—the practice not appearing to be clearly settled. The defendant objects to the Court signing this certificate; but without waiving any of his objections, request the Court if it signs the certificate at all, to further certify that the defendant testified that as the plaintiff was his brother and had been sufficiently punished for his misconduct, and their father was an old man and very nervous and infirm, and this trouble was a great source of worry to him, he desired that the grand jury would not bring in any indictment against the plaintiff, or words to that effect.

“Witness our hands and seals, this 28th day of January, 1895, counsel agreeing that the foregoing be signed upon an understanding between counsel that it is subject to objection made in this Court by defendant’s counsel, and with the right to defendant’s counsel to press said objection in the Court of Appeals. Jas. Revell, I. Thomas Jones.”

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and BOYD, JJ.

Frank H. Stockett and James M. Munroe, for the appellant.

D. R. Magruder and Robert Moss (with whom was *J. R. Magruder*, on the brief), for the appellee.

BOYD, J., delivered the opinion of the Court.

This was an action for malicious prosecution brought by the appellee against the appellant. At the conclusion of the plaintiff’s testimony, the defendant asked the Court to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover. The rulings of the Court in rejecting that prayer and in excluding some evidence, to be hereinafter referred to, are before this Court for review.

It is contended on the part of the appellee that the prayer

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is too general and was properly rejected by the Court below on that ground. It certainly did not direct the Court's attention to the particular point or points in which the evidence, in the opinion of the defendant, failed. It is a practice not to be approved of; but, without stopping to discuss the form of the prayer, we think no sufficient reason has been given to justify us in saying that the evidence is so lacking in any material point necessary to sustain the plaintiff's case that it should not have been submitted to the jury.

It is conceded that the plaintiff was prosecuted by the defendant for an alleged criminal offence—an assault with intent to kill. He was imprisoned in the county jail for about two weeks, when he was admitted to bail. It was shown by the evidence of the deputy clerk that no presentment had been found against the plaintiff, and by the foreman of the grand jury that the case was dismissed. There can, therefore, be no question that the prosecution had been finally terminated in favor of the appellee. *Hyde v. Greuch*, 62 Md. 582. A careful examination of the record satisfies us that there was abundant evidence from which the jury could find that the arrest was without probable cause. The testimony of the plaintiff not only tends to show that he did not assault the defendant, but that on the contrary he was assaulted by him. It is true that he admits that he threw a brick at the door of the kitchen connected with the house which he wanted to enter to see his father. But the circumstances, as detailed by him, which for the purposes of this prayer we must accept as true, were such that the jury may have well reached the conclusion that the charge made by the defendant was wholly unjustifiable. He was not acting on what others had told him, but on what he could see for himself. The plaintiff testified that "I told him (defendant) that I had come to see my father, and started to enter the kitchen door, and as I placed my foot on the step he shoved me back and I caught on my hands; as I fell back my hand

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came in contact with a brick, and I picked it up; my brother by this time had gone in the kitchen and left the door nearly closed, being prevented from closing it by my foot placed on the sill; I threw the brick at the door and then went in the kitchen." The jury might well have found, if they believed that statement, that the defendant was not justified in having the plaintiff arrested for committing an assault on him, with a brick, with intent to kill, and that the arrest was without probable cause. If they found that the arrest was without probable cause, they could infer malice, and there was, moreover, other evidence in the case to support that inference. It was clearly a case for the jury to pass upon, and the Court would not have been justified in withholding it from them. That prayer was therefore properly rejected.

After the foreman of the grand jury had testified that the case against the plaintiff was dismissed, the defendant asked on cross-examination why it was dismissed. The Court refused to permit the question to be answered. The record shows that the witness had been permitted to testify that the case had been dismissed by the grand jury for the purpose of showing that the prosecution was ended. The evidence being admitted for that purpose, it is difficult to see the relevancy of the inquiry why it was dismissed—in other words, why it was ended. But different reasons might have influenced the grand jurors, and it was not competent for the foreman to undertake to give them. As was said in *Elbin v. Wilson*, 33 Md. 144: "All the authorities concur in saying that the juror will not be permitted to state how any member voted, or the opinion expressed by his fellow or himself, or the individual action of any juror in regard to the subject-matter before them." This is not such a case as *Knott v. Sargeant*, 125 Mass. 95, relied on by the appellant. There the grand jury simply did not find a bill at the first term of Court—they did not dismiss the case. The recognizance which the accused had entered into required her to appear at the October

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term of 1874 of the Court, and at any subsequent term or terms until the final sentence, decree or order of that Court. It was held that she had not been discharged and the case was consequently not ended. The *District Attorney* was therefore permitted to testify that the case was continued before the grand jury by reason of the absence of the witness. Cases occur in which it is essential to call grand jurors as witnesses, but the rule should not be extended beyond what is necessary for the purposes of justice, and it would be exceedingly dangerous, in most cases, to permit them to explain or assign reasons for their actions.

Much of what we have already said about the question involved in the first bill of exceptions applies to the second, third and fourth. In all of them the effort was made to have the foreman explain the action of the grand jury. The object seemed to be to show that the prosecution was abandoned at the instance of the appellant. We do not think that relevant. We must assume that the grand jury would not have dismissed the case, even at the instance of the appellant, unless they thought it proper to do so. There was no proffer to show that the appellant took such action at the request or with the knowledge of the appellee. Nor do we think that any effort on the part of the appellant to have the case dismissed could be offered in evidence, either in bar of the suit or in mitigation of damages. The appellee had already suffered the injury he complained of, as he had been arrested in the month of May before the October term of Court, when the case was dismissed, and had remained in jail for two weeks. It may be that the appellant believed he had done his brother a wrong, or he may have been anxious to relieve himself from farther liability, or he may have acted from a desire to save his father from annoyance and his brother from further trouble, but whatever his motive was his action then would not compensate the appellee for the injury already done him. Of course the dismissal of the case did not preclude the appellant from showing that the appellee was in fact guilty,

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and the learned Judges below have certified that they granted prayers instructing the jury that the burden of proof of showing a want of probable cause was on the plaintiff. That was, evidently, because the testimony of the foreman of the grand jury had only been admitted to prove that the prosecution was ended and not for the purpose of showing a want of probable cause. But the certificate of the Judges also shows that after the exceptions were taken by the defendant he testified that he went before the grand jury and requested them not to indict his brother. So we find that he did get the benefit of the testimony he is complaining of having been excluded. It is contended on the part of the appellant, that this Court cannot consider the certificate of the Judges. No authority has been offered to sustain that position, and we can see no reason why it cannot be done under such circumstances as those in this case. All of the exceptions were taken before the plaintiff closed his case. It has been frequently decided by this Court that even if an error be committed by rejecting testimony, and it is subsequently admitted during the trial of the case, the judgment should not be reversed on account of the original error. A bill of exceptions ordinarily only contain what has transpired, and is relevant to the time the exception was noted, and it may be signed at once. If subsequent to that time the error is corrected, cannot the trial Judge certify that fact to the appellate Court? For example, suppose the defendant had called the foreman of the grand jury as his witness, and had asked the identical question stated in these bills of exceptions, and the witness had answered them without objection or with the permission of the Court, could it be said that if the Judges below had already signed the exceptions they could not inform this Court of what subsequently transpired? There ought to be no doubt about their right to do so, for if this Court deemed the ruling of the Court below, as set out in the exceptions, reversible error, it might reverse the judgment for the exclusion of testimony which in point of fact was before the jury. The certificate was

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filed the same day the bills of exceptions were and expressly refers to them. If the exceptions were not signed before the testimony was taken by the defendant, the Judges might have inserted in them the facts stated in the certificate ; but as they did not, there can be no valid objection to their signing a certificate of this character to be taken in connection with the exceptions.

As we find no error in the rulings of the Court below, the judgment must be affirmed.

*Judgment affirmed with costs to the
appellee.*

(Decided June 19th, 1895.)

DAVID STEWART *vs.* CHRISTIAN DEVRIES OF S.,
TRUSTEE.

Trustee's Sale—Knowledge of Title by Purchaser.

A purchaser at a trustee's sale, who knew of an alleged defect in the title of the property at the time he made his bid, is not entitled to except to the ratification of the sale on that ground.

Appeal from an order of the Circuit Court of Baltimore City (DOBBLER, J.), overruling appellant's exceptions to a trustee's sale and finally ratifying the same. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

David Stewart and Redmond Conyngham Stewart, for the appellant.

Richard S. Culbreth, for the appellee.

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Boyd, J., delivered the opinion of the Court.

Christian Devries, of S., was appointed trustee to sell certain real estate in a proceeding in the Circuit Court of Baltimore City, between the heirs of Wm. Devries, deceased. In August, 1887, he reported a sale of a lot of ground situated in Baltimore City, to Laura Lee Capron, for the sum of \$11,666.66, which was duly confirmed. In August, 1892, he filed a petition alleging that the purchaser had not complied with the terms of the sale, and asking for authority to resell the property at her risk and expense, unless the amounts alleged to be due be paid. The Court having passed an order *nisi*, Mrs. Capron answered the petition, assigning as a reason for her non-compliance with the terms of the sale, that the trustee was unable to give title to the whole lot, as a part of it belonged to the estate of one John Rutter. Considerable testimony was taken, and the Court finally ordered a resale of the property at the expense and risk of Mrs. Capron.

On the 12th of June, 1894, the trustee reported the sale of that lot to the appellant for the sum of \$11,100.00, who filed exceptions to the ratification of the sale, on the ground that the trustee could not give a good and merchantable title on account of the interest of the Rutter estate. Testimony was taken, and the case submitted to the Circuit Court of Baltimore City, which resulted in an order of that Court overruling the exceptions of the appellant and ratifying the sale. From that order this appeal was taken.

It is well settled in this State that a trustee appointed by a Court of Equity is the agent of the Court; and hence, if the question be raised in due time, the Court will see that no undue advantage is taken of the purchaser, and he will not be compelled to comply with the terms of a sale if it would be inequitable for him to do so, especially if there has been any misrepresentation, intentional or otherwise, by the trustee. That rule is necessary for the purposes of justice, as well as to encourage bidding at trustee's sales. But when a purchase is made by one who is cognizant of

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all the essential facts necessary to enable him to understand what the trustee is selling, the Court should be equally zealous in protecting the rights of those interested in the proceeds of the sale of the property, and in not permitting its agent, the trustee, to be trifled with.

There is nothing in this record that suggests any very serious question as to the title to this lot. It is conceded that there is no difficulty as to the front part of the lot, but it is contended that there is a cloud on the title to the rear portion of it by reason of the possible interest in it vested in the estate of John Rutter. William Devries purchased the whole lot in 1852, and it seems to have been held by him and his heirs, and those under whom they claim, since 1828. The learned Judge below based his opinion on these and other facts disclosed in the case, and reached the conclusion that the title of the Devries estate is good and merchantable for the whole lot. Without meaning to be understood as differing from him, we express no opinion on that question, because under the view we take of the case it is unnecessary.

The evidence shows conclusively that the appellant knew of the alleged defect in the title before he bid on the property. In his letter to the attorney representing the trustee, he wrote: "If you are going to argue the Devries case on the point that I am bound to take the title, whether it is good or not, because I knew of the defect before I bid for the lot, we can proceed at once without testimony. For I admit that I know your title to be defective, as you allege in your answer, and you can file this letter as my admission." The letter referred to the answer of the trustee to the exceptions to the sale filed by the appellant, which alleges that the appellant not only knew of the supposed defect in the title before the sale, but that he had full and particular information of all the facts in relation to it; that he had the papers in the case for about two weeks before the sale, and that the proceedings in the cause disclosed to him all the facts upon which he now relies. The appellant

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subsequently testified, and not only did he not deny the allegations thus made in the answer of the trustee, but on the contrary substantially sustained them, as he had done by his letter. He knew that the former purchaser had undertaken to relieve herself of the obligation to take the property by setting up this alleged defect in the title, and that the Court had refused to release her and ordered a re-sale at her risk.

The trustee contended in that proceeding that the title he was selling was good, and the appellant had every opportunity to ascertain before he purchased upon what the trustee relied, and whether or not he was correct. The appellant certainly had no good reason to suppose that the trustee was undertaking to sell anything but the title of which the estate of William Devries was vested. As an attorney at law he must have known that the trustee could, under the power vested in him by the decree, only sell the interest of the parties to the suit and those claiming under them. The former proceedings in the case were sufficient to notify him that the trustee would not undertake to acquire the title of John Rutter or any one else. He might have assumed that if the trustee intended to purchase any outstanding title, or claim of title, that he would have done so before the sale, or at least announce at the sale that he would yet do so in order to obtain as large a price as possible, but no such intimation was given by the trustee. Nothing was done by the latter, which was calculated to mislead any one—particularly the appellant who was familiar with all the facts. If he had any doubt about what the trustee was selling, he certainly had information enough to suggest the propriety of his making inquiry of the trustee, so as to inform himself. As was said in *Kauffman v. Walker*, 9 Md. 240: "Judicial sales will not be set aside for causes that the parties in interest might with a reasonable degree of diligence have obviated. Every intendment will be made to support them."

We have not deemed it necessary to discuss the other

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questions suggested in argument. As the appellant had ample notice of what the trustee was selling, and as he purchased the property with full knowledge of the defect alleged in the title, it cannot be said that he was in any way misled by the trustee, or that any injustice will be done in requiring him to take the property in the condition he knew it to be in when he made his bid, and the order must be affirmed.

The Judge below directed the costs in that Court to be paid out of the funds in the hands of the trustee. We will not disturb that order, but the costs in this Court, including the costs of making up the record, must be paid by the appellant.

*Order affirmed, costs in this Court
and of the transcript of the rec-
ord, to be paid by the appellant.*

(Decided June 19th, 1895.)

THE LAKE ROLAND ELEVATED RAILWAY COMPANY vs. JOSEPH P. WEBSTER.

Elevated Railways—Liability for Injury to Property Owner.

When the construction of an elevated railway in a city street diminishes the rental value of property leased to the plaintiff, he is entitled to recover damages therefor to the extent to which the usable value of his premises has been thereby diminished, although the premises are not directly opposite the elevated structure.

The fact that a corporation is authorized to build and operate an elevated railway does not exempt it from liability for injuries to property lying upon or near to the street occupied.

An elevated railway, duly authorized to be constructed, upon a street of a city, is not a nuisance, and no one can maintain an action for the damage caused by such obstruction to travel which he suffers in common with the public at large.

Appeal from the Court of Common Pleas. The case is stated in the opinion of the Court. At the trial the plaintiff offered one prayer, which is set forth in the opinion and which was granted. The defendant offered the following prayers:

Defendant's 1st Prayer.—The defendant prays the Court to instruct the jury, that the plaintiff in this action has offered no evidence legally sufficient to entitle the plaintiff to recover. (Rejected.)

Defendant's 2nd Prayer.—That the elevated structure of the defendant and the inclined approach to the same complained of in this case, have been lawfully constructed on North street, with the full authority of the General Assembly of Maryland and the Mayor and City Council of Baltimore; and that said structure and approach do not constitute a nuisance, and that the defendant is not a trespasser. (Granted.)

Defendant's 3rd Prayer.—That the defendant has not actually taken any property of the plaintiff's in this case, and that the plaintiff has no other property in any part of the bed of North street. (Granted.)

Defendant's 4th Prayer.—If the jury shall believe from the evidence that the southern end of the elevated structure complained of in this action reaches the surface of North street more than twelve feet north of the north line of the lot occupied by the plaintiff, and that no part of said elevated structure or the inclined approach thereto is opposite the said lot, and that there is no obstruction to the light or air of the said lot, and that the only obstruction to passage in the bed of North street, by reason of said structure, occurs at a point distant more than twelve feet north of the north line of said lot, as shown upon the plat filed in said cause, then the injury, if any, suffered by the plaintiff, is an injury suffered by him in common with the public different, if at all, only in degree and not in kind from that suffered by the public, and the plaintiff is not entitled to recover. (Rejected.)

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Defendant's 5th Prayer.—If the jury shall believe from the evidence that after the completion and operation of the defendant's railway over the structure complained of, the owner of said property and the plaintiff entered into a new agreement, whereby the said owner agreed to charge, and the said plaintiff agreed to pay a rent of nine hundred dollars per annum in lieu of the rental of twelve hundred dollars per annum, reserved in the lease offered in evidence, from the date of said new agreement to the end of the term prescribed by said lease, subject in all other respects to the same terms as those prescribed in said lease, and shall further find that the said new agreement was made because of and in contemplation of the supposed injury to the plaintiff by reason of the construction and operation of the defendant's railway, then their verdict must be for the defendant. (Rejected.)

Defendant's 6th Prayer.—That in estimating any depreciation in the value of the plaintiff's leasehold interest since the building and operation of the defendant's railway, they must deduct from the amount which they shall find as such depreciation (if any) all amounts which they shall believe from the evidence to have resulted from any or all of the following causes: (1.) The widespread depression of business of all kinds during the commercial panic of 1893-94. (2.) The use of rapid transit railways in the city and suburbs in lieu of horses and carriages. (3.) The use of bicycles as substitutes for the saddle-horse and the horse and buggy. (4.) The operation of a double track *surface* electric railway on a narrow street, in front of the stables occupied by the plaintiff, with cars running at short intervals, at high rate of speed, in both directions. (5.) The resort to stables on the outskirts of the city, because of the danger and inconvenience of driving in and across cable and electric railways. (6.) The abandonment of old-fashioned stables for new stables, with improved methods of ventilation and equipped with modern conveniences. (Granted.)

Defendant's 7th Prayer.—That in estimating the damages,

if any, to be awarded to the plaintiff, the jury cannot consider either the good-will of his business or his prospective profits thereupon, or any inconvenience or loss arising from the interruption of his business. (Granted.)

The Court below (HARLAN, C. J.), granted defendant's second, third, sixth and seventh prayers, and rejected its first, fourth and fifth prayers. The jury returned a verdict for the plaintiff, assessing his damages at \$1,000, and from the judgment thereon the defendant appealed.

The cause was argued before BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

John N. Steele and Francis K. Carey (with whom was John E. Semmes on the brief), for the appellant.

The prayer offered by the appellee and granted by the Court, gave to the jury a wholly misleading and illegal measure of damages. It instructed the jury that the appellee was entitled to recover the amount which the jury should find that the "*rental value of the premises*," under the lease offered in evidence, had been diminished by the appellant's railway. Not only does the language, "*the rental value of the premises*," refer to diminution in the actual selling value of the property, for which the owner of the land and not the tenant can recover, but the prayer failed to instruct the jury to limit the injury to the rental value *during the term*, that is to say, to the *interest of the appellee* in the property, and failed to instruct them to make the proper allowance for the reduction in the rent reserved under the lease. The true and only legal measure of damages was the difference between the market value of the leasehold term before and after the building and operation of the appellant's railway.

The general rule is that only persons whose lots are opposite an elevated railway structure can recover damages therefor. *Booth on Street Railways*, sec. 186; *Met. R. Co. v. Levy*, 13 N. Y. 367; *Bischoff v. N. Y. El. Ry. Co.*, 18 N.

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Y. Supp. 865; *Mooney v. Same*, 16 Daly, 145; *Ottinger v. Same*, 18 N. Y. Supp. 238; *Carr v. St. Louis Ry. Co.*, 39 Minn. 296; *Smith v. Boston*, 7 Cush. 254; *Buhl v. Union Depot Co.*, 98 Mich. 596; *Houck v. Wachter*, 34 Md. 265; *Dantzer v. Ind. Ry. Co.*, 39 N. E. Rep. (Ind.) 223; *Eberle's case*, 110 Ind. 543; *Heller v. R. R. Co.*, 28 Kansas, 625; *Martin v. Ry. Co.*, 47 Mo. App. 457.

The appellee has been compensated by the reduction of his rent, and under such circumstances, it is the landlord and not the tenant who is damaged. The change in the annual rental creates in law a new lease, although the other terms of the pending lease are not altered. *Booth on Street Railways*, sec. 204; 23 Am. & E. Ency., 1058; *Kearney v. Met. Ry. Co.*, 129 N. Y. 80; *Kernochan v. N. Y. El. Ry. Co.*, 128 N. Y. 559; *Jaffray v. Greenbaum*, 64 Iowa, 492.

An elevated railway built and operated under lawful authority in a public street, is not liable in damages for losses in business conducted in property abutting upon the street, even though it may be proved that the construction and operation of the elevated railway has in fact caused such losses; nor can alleged injury to possession be measured by losses in business. *Taylor v. Met., &c., Co.*, 50 Sup. Ct. Rep. 311; *Rickett v. Met. Ry. Co.*, L. R. 2 H. L. 175; *Ches. Co. v. Mackenzie*, 74 Md. 50; *Mayor, &c., v. Rice*, 73 Md. 307.

John Prentiss Poe, Attorney-General, for the appellee.

BRYAN, J., delivered the opinion of the Court.

The plaintiff below (now appellee) obtained a judgment against the Lake Roland Elevated Railway Company, and the defendant has appealed to this Court. The evidence is set out in the transcript with great detail; much more than is required for any reasonable purpose. The portions of it necessary to present the questions of law which we are to decide might have been fully stated within a much smaller compass. In February eighteen hundred and ninety-two

the plaintiff rented from William H. Birch the lot known as No. 206 North street, for the term of five years, at the annual rent of twelve hundred dollars. The defendant's railroad runs on North street, and its elevated structure is in the middle of the street; it is not directly in front of the rented premises but it begins about twelve feet north of the northern boundary. The railway was completed and the cars began to run in May, eighteen hundred and ninety-three. The lot rented by the plaintiff is improved by a building which has been used as a livery stable for a number of years, and is not adapted to any other purpose. The plaintiff's business is to keep a livery stable, and he rented the property for that purpose. After the road was in operation, the landlord made a reduction in the rent, bringing it down to nine hundred dollars a year. Evidence was offered in behalf of the plaintiff tending to show that the construction of the elevated portion of the road had been very injurious to his leasehold interest, and had greatly diminished its rental value; and evidence was offered in behalf of the defendant tending to show the contrary. The testimony was extremely conflicting; some of it was to the effect that the rental value was entirely destroyed; and on the opposite side it was testified that it had not been affected at all. The testimony was addressed to the jury; it is altogether unnecessary for us to state any of the details. On the prayer of the plaintiff the Court gave to the jury the following instruction: "The plaintiff, by his counsel, prays the Court to instruct the jury that if they shall find from the evidence that the rental value of the premises known as Nos. 206 and 208 North street, and occupied by the plaintiff as tenant of William H. Birch under the written lease offered in evidence, has been diminished by the construction and use of the elevated railway of the defendant corporation on North street, then the plaintiff is entitled to recover, and the measure of damages is the amount which the jury shall find said rental value has been so diminished."

The elevated structure of the defendant on North street

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is lawfully authorized, and therefore its obstruction to travel on the street cannot be regarded as a nuisance. It is clear that no one can sustain an action for damage caused by this obstruction which he suffers in common with the public at large. But the right to build this elevated road does not imply exemption from responsibility for injuries inflicted on private property by its operation and construction. It is hardly necessary to add anything to the discussions which have heretofore taken place on this subject. In *Baltimore and Potomac R. R. Co., v. Reaney*, 42 Maryland, 117, the question was fully considered, and the principles then declared have ever since been considered as settled in this State. The railroad company was authorized to construct a tunnel under the bed of Wilson street, in the city of Baltimore, and by the excavation of the street for the purpose of constructing the tunnel, a house on Madison avenue was injured, the foundation being weakened and the walls caused to crack. The question was, whether the owner of the house was entitled to recover? This Court, in a very able and luminous opinion by JUDGE ALVEY, held that although the excavation of the street was lawful and the work was done in a lawful manner, the railroad company was liable for the damages which actually resulted from the work. And in *O'Brien v. Baltimore Belt R. R. Co.*, 74 Maryland, 374, the right of adjoining lot owners was fully recognized to redress for any substantial injury to their property rights, "*produced by the construction or operation of the railroad in the street.*"

It has been objected in the present case, that the elevated structure was not *immediately* in front of the plaintiff's stable, but about twelve feet north of it. But the right to redress depends on the question whether damage was done, and not on the proximity or distance of the operative cause of the injury. In *Reaney's case*, the injured house was not on the same street with the tunnel, and was distant more than twenty-four feet from the corner. The ground of recovery was the damage caused by the tunnel; the measurement of distance was not an element in the case. Article

23, section 169 of the Code was referred to in the argument. If we compare this section with the one hundred and sixty-seventh of the same Article, to which it refers, we will be enabled to see its meaning clearly. It is intended to enable a railroad company to acquire a right to occupy a street or other public way for the location of its tracks, and it authorizes condemnation in the same manner as the property of private persons may be condemned under section one hundred and sixty-seven; but there is one addition to its responsibilities. By the one hundred and sixty-seventh section, the road is compelled to pay only the damages which the owner of the condemned land will sustain by the use and occupation of his property by the corporation; whereas, when the tracks are laid upon a public street, the one hundred and sixty-ninth section expressly enacts, that the corporation shall be responsible for injuries done by the location of its tracks to private property lying *upon or near* to the street so occupied. This is an exceptional and remarkable feature of corporate responsibility attached by the statute to the use of streets by railroads. There is a further provision (not now in question), that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities. The section which we have been considering was intended to give statutory sanction to this responsibility, but it cannot be supposed that it could be construed so as to relieve railroad companies from liability for any other damages which they might cause to private property. It may serve, however, to set in a clear light the mistake of supposing that they are responsible only to abutting owners.

The plaintiff's prayer claims damages for the diminution of the rental value of his leasehold property. His testimony was that before the building of the road the annual value of the property was twelve hundred dollars, and the construction and use of the road reduced this value so much, that it was worth nothing. His landlord remitted three hundred dollars of the rent, leaving him still bound to pay nine hun-

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dred dollars a year. If the jury found that the *usable* value of the property was destroyed or diminished by the cause alleged, they were justified in finding a verdict for the damage done. Great exception is taken to the language of the prayer. But it seems to us that its fair meaning is that the jury are to find the damages which the plaintiff sustained as tenant of the premises by the diminution of its rental value. It could not easily be construed as meaning that they were to find the damages which the landlord had suffered. It is not questioned that the draughtsman of the prayer might have presented the question of damages in a different manner as was done in *Rice's case*, 73 Maryland, 307. He has chosen, however, to ask compensation for the diminution of the usable value of his premises; this was certainly an injury to him, and he certainly ought to recover for it. The rejected prayers of the defendant are all inconsistent with the views which we have expressed, and ought not therefore to have been granted.

Judgment Affirmed.

(Decided June 20th, 1895.)

EDMUND B. DUVAL *vs.* LOUIS BECKER.

Abandonment of Easement of Right of Way by Mortgagor—Right of Purchaser at Foreclosure Sale to all the Estate Conveyed by the Mortgage—Abandonment of Easement by Act in Puis.

A mortgagor cannot before default, by his own act and without the consent of the mortgagee, abandon an easement appurtenant to the estate and expressly included in the mortgage, so as to bind the mortgagee or prevent the easement from passing to the purchaser upon a foreclosure sale, although the security of the mortgage debt may not have been impaired by such abandonment.

The doctrine that the mortgagor, while in possession and before foreclosure, is treated as the real owner of the property, does not apply between mortgagor and mortgagee; and the mortgagor can-

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not by his own act release the easements appurtenant to the mortgaged estate, or force the mortgagee to accept as security for the payment of the debt anything less than the entire estate originally granted.

The acts *in pais* relied on to constitute an abandonment of a right of way must be of a decisive character, and done by the party against whom they are invoked, or by one under whom he claims.

Appeal from a judgment on verdict of the Superior Court of Baltimore City (RITCHIE, J.) The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, ROBERTS and BOYD, JJ.

John Prentiss Poe, Attorney-General, and Edgar Allen Poe (with whom was *R. M. Ridgely* on the brief), for the appellant.

The question presented upon this appeal is this, viz: May a mortgagor in possession before default, lawfully abandon a right of way appurtenant to the mortgaged property, over an adjacent tract belonging to the mortgagor, in fee simple, when such abandonment does not impair, but, on the contrary, increases the value of the mortgaged property; and may a subsequent purchaser of the mortgaged property, with actual knowledge of the abandonment and actual closing of such way, and after the foreclosure sale and full satisfaction of the mortgage debt, maintain an action for its obstruction against the purchaser of the adjacent tract through which the way passed?

Apart from the effect of the mortgage, the right of way appurtenant to the land owned by the appellee, over the land owned by Mrs. Du Val, the wife of the appellant, was extinguished as the necessary legal effect of the unity of title held by H. Webster Crowl, in both the dominant and servient tenement. *Oliver v. Hook*, 47 Md. 301.

Also, apart from the mortgage, the sale, on the 30th of March, 1889, by H. Webster Crowl, of the servient tenement without any reservation whatsoever to himself as the

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then owner of the dominant tenement, of the right of way in question, operated as a complete abandonment and relinquishment of such right of way. *Mitchell v. Seipel*, 53 Md. 251.

The existence of the mortgage did not deprive Mr. Crowl, as the owner of the dominant tenement, of the right to close up and abandon the private way through and over the servient tenement, for the reason that mortgages in Maryland are now only treated as a security for a debt, and that the owner of the equity of redemption of the mortgaged property in possession thereof and before default, is entitled to give up a right of way appurtenant to the mortgaged property, wherever such abandonment does not in any degree, or to any extent, impair the security of the mortgagee. Mortgagors in possession before default are, to all intents and purposes, regarded as the owners of the mortgaged property, and may deal with it as they please, provided such dealing, use and management do not injuriously affect the mortgagee's security. *A. E. R. R. v. Gantt*, 39 Md. 139 and 140; 1 *Jones on Mortgages*, secs. 11, 12 and 34; 15 *Am. and Eng. Encycl. Mortgages*, 730-738.

The testimony in this case shows that the plan of improvement carried out by Crowl, as mortgagor in possession of the property now belonging to the appellee, and as the owner of the adjacent property, enhanced the value of the security, and, therefore, the mortgagee and all claiming under him cannot lawfully object to the closing up of said road and the abandonment of such right of way, nor maintain an action for its obstruction. *Vogeler v. Geis*, 51 Md. 407; *Glenn v. Davis*, 35 Md. 208.

Inasmuch as the private road in question was actually closed and abandoned long before Bayless bought the property, on the 2d of January, 1891, and inasmuch as when he bought it, he had actual knowledge that the private road in dispute had been actually closed up and abandoned, and inasmuch as the appellee, when he bought the property on

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the 26th of March, 1891, also, well knew that the road had been actually closed up and abandoned, the appellee is not entitled to maintain the suit, for having bought the property at a time when the road in question was actually closed and no longer visible, he is not now at liberty to claim an easement which did not exist at the time of his purchase. There was no easement in existence when the appellee bought his property. The purpose of the mortgage had been fully accomplished. The mortgage debt was paid, and the mere insertion in the appellee's deed of an erroneous reference to a right of way, which visibly and notoriously did not exist, cannot revive it, so as to give the appellee, without injury or pretense of injury, a right of action. *Vogeler v. Geis*, 51 Md. 411.

Randolph Barton and *Randolph Barton, Jr.*, for the appellee.

We have here the case of a mortgagor surrendering a right of way appurtenant to the mortgaged property, and attempting to open another way, through other property, likewise subject to a mortgage, without the consent in either case of the mortgagee; of both mortgages being subsequently foreclosed by their respective holders, of the mortgaged properties being both advertised for sale, and sold without reference or regard to such subsequent acts of the mortgagor; and of the question subsequently arising between the purchaser of the property entitled to the way abandoned by the mortgagor, and the owner of the property in whose favor the right had been abandoned, as to the effect of the abandonment by the mortgagor.

On this state of facts, the Court is called upon to decide: 1st. Whether a mortgagor can, without the acquiescence and consent of the mortgagee, so impose easements and servitudes upon the mortgaged premises, or so abandon rights appurtenant thereto, that the mortgagee, both before and after default, is bound thereby, and that upon foreclosure the property must be sold, and the purchaser take

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title, subject to such alterations, even although the security of the mortgage debt is not thereby impaired? 2nd. If not, is there any evidence in this case legally sufficient to show such acquiescence on the part of the mortgagee?

3rd. If, on the contrary, the mortgagor does possess such power, is there still any evidence in this case that the security of the mortgaged debt was not in fact impaired by the abandonment by the mortgagor of said right of way?

4th. When the equity of redemption in two adjoining parcels of land, each subject to a mortgage, to different parties, becomes vested in the same owner, does an easement appurtenant to one of said lots, in the adjoining lot, become extinguished *as against the mortgagee*, of said dominant tenement by the mere fact of the unity of ownership of the *equity of redemption* in the two lots, in the same party; provided the security of the mortgage debt secured by the mortgage upon said dominant tenement be not thereby impaired?

5th. Assuming that a mortgagee's rights are not affected by the abandonment by the mortgagor of an easement in the mortgaged property, can the mortgagee transmit such rights to his assignee, or to a purchaser under a foreclosure sale, or does *mere knowledge* of said abandonment, on the part of such assignee or purchaser, estop him to question said abandonment, even though inoperative as against his assignor?

6th. Is the mere fact that a party entitled to a right of way (not a way of necessity) subsequently acquires a better way or outlet for his property, sufficient in law or in equity to prevent him recovering (at least nominal damages) against a defendant, for occupying and obstructing said former right of way; provided the renewal of the use by the plaintiff, of his said way will be annoying and injurious to said defendant, and of no corresponding advantage to the party legally entitled thereto?

We submit that no one of these questions can be affirmatively answered. 2 *Jones on Mortgages*, sec. 1654; *Mur-*

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phy v. Welch, 128 Mass. 489; *Harlow v. Whitcher*, 136 Mass. 553; *Union Hall Asn. v. Morrison*, 39 Md. 290; *Reynolds v. Ins. Co.*, 34 Md. 289; *Tongue's Lessee v. Nutwell*, 17 Md. 230; *Schaidt v. Bland*, 66 Md. 148; *Vogeler v. Geis*, 51 Md. 410; *Arnd v. Amling*, 53 Md. 200; *Capron v. Greenway*, 74 Md. 289; *Glenn v. Davis*, 35 Md. 215.

McSHERRY, J., delivered the opinion of the Court.

The facts out of which the questions now before us arise, are as follows: In 1877 Dodson and wife executed to H. A. Thompson a mortgage upon a lot of ground then situated in Baltimore County, but now lying within the limits of Baltimore City, which lot we will designate Lot A. The only means of access to this lot was over a private right of way across what is now the Duval lot, which adjoins Lot A on the east. This right of way, whose centre line was clearly defined by courses and distances, was specifically included, by accurate description, in the above named mortgage. The mortgage was subsequently assigned by Thompson to Loney, and then by Loney to Hughes, and finally by Hughes to Whelan. Whelan foreclosed it in November, 1890. At the sale Taylor bought the Lot A, and it was duly conveyed to him after the sale had been ratified. He afterwards sold the same lot to Bayless, who, on March 26th, 1891, conveyed it to the appellee, Becker. In the advertisement of the foreclosure sale, and in the deeds from Whelan to Taylor, from Taylor to Bayless, and from Bayless to Becker, the right of way is described in precisely the same terms that are used in the Dodson mortgage. Thus, according to the record evidence before us, Becker, the appellee, has, by the conveyances alluded to, a clear paper title to the right of way. In 1883 H. Webster Crowl acquired the equity of redemption in this Lot A, and in a lot adjoining it on the south, and binding on North avenue. This last named lot we will call Lot B. Crowl owned, in addition, the fee-simple of several lots adjoining on the east, one of them being the Duval lot,

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or the one over which the right of way appurtenant to Lot A was located. In 1888 or 1889 he closed up this right of way over the Duval lot, then owned by him in fee, and opened without the consent of the mortgagee, then holding the mortgage on Lot B, a different way across Lot B, from North avenue to Lot A. The mortgage on Lot B was subsequently foreclosed and without any reference to or mention of this new way so laid out by Crowl, and called by him Windsor avenue, Lot B was sold and conveyed to Spaulding, who later on conveyed it to Becker, the appellee. After closing up the first named right of way over the Duval lot by building a terrace on the bed thereof, Crowl conveyed the servient tenement, over which the right of way described in the Dodson mortgage extended, to Llewelyn without any reservation in the deed of the right of way at all. Through several *mesne* conveyances the title to this lot—now called the Duval lot—finally became vested in the appellant's wife. In May, 1893, the appellant—the husband of the owner of the Duval lot—erected a wire fence across the route of the private way described in the Dodson mortgage, and thereupon this suit was brought against him by the appellee, Becker—the owner of Lots A and B—for obstructing his, Becker's, use of said way. Upon the trial in the Superior Court of Baltimore City a single exception was reserved, and that brings up for review the rulings of the learned trial Judge upon the prayers for instructions to the jury. The verdict and judgment were in favor of the plaintiff, and the defendant, Duval, has appealed.

At the instance of the plaintiff, Becker, who is the appellee in this Court, the jury were instructed in substance, that under the papers offered in evidence, being the deeds and record evidence to which brief reference has been made, the right of way appurtenant to Lot A, over and across the Duval lot, was included in the Dodson mortgage; that the mortgaged property, including the right of way, was sold, and the title thereto passed by regular conveyances to the

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plaintiff; and that if the jury should find that the appellant had thereafter erected the wire fence described in the evidence, and had thereby obstructed the said way, "then the plaintiff is entitled to recover * * * * unless they find that said Hughes, Whelan, Bayless or Taylor acquiesced in the abandonment or closing of said right of way before the said plaintiff purchased the property so covered by said mortgage; and they are instructed that there is no evidence legally sufficient in the case to show such acquiescence."

The defendant asked four instructions, all of which were refused. By the first he requested the Court to say to the jury that under the various deeds Crowl, when he purchased the equity of redemption in Lots A and B, and the fee-simple in the Duval lot, became the owner of these several lots, and by virtue of the unity of the title thereby acquired in said lots the right of way which prior to the union of such titles had been appurtenant to Lot A over the lot now owned by Duval, became and was extinguished; and the plaintiff was not entitled to recover, provided the jury should find that the Dodson mortgage on Lot A was not due and in default when the titles united, and that the extinguishment of the right of way did not impair the security of the mortgage debt. By the second prayer he asked the Court to rule that the omission from Crowl's deed conveying to Llewelyn what is now the Duval lot of a clause reserving any right of way in favor of Lot A over the servient estate, operated in law as an extinguishment of the right of way which previously existed; and the plaintiff would not be entitled to recover, provided the jury should find that the Dodson mortgage on Lot A was not due and in default when the conveyance to Llewelyn was made, and that the extinguishment of the right of way did not impair the security of the mortgage debt. The third prayer is founded on the theory that if Hughes, before he purchased the Dodson mortgage, went upon the property and saw that Crowl had abandoned the old road, and thereafter became the

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assignee of the mortgage, and if Bayless, when he bought from Taylor, also knew of this abandonment, and if the plaintiff when he bought from Bayless was likewise apprised thereof, and subsequently used the Windsor avenue way opened by Crowl over Lot B; and if the closing of the original private way occasioned the plaintiff no damage prior to the institution of the suit, and the Windsor avenue way was a shorter, better and more convenient way for the plaintiff, and that the re-opening of the other way over the Duval lot will be injurious to the defendant and be of no benefit to the plaintiff, then the plaintiff is not entitled to recover. The fourth prayer denies the plaintiff's right to recover if Bayless and the plaintiff knew that Crowl had abandoned the old and opened up a new right of way.

It is thus apparent that the question lying at the very root of the controversy is, whether a mortgagor can before default by his own act, and without the consent or acquiescence of the mortgagee, and as against the latter, abandon an easement appurtenant to the estate mortgaged, which easement is in express terms included within and covered by the lien of the mortgage, and can by such abandonment so bind the mortgagee that, though upon foreclosure the property and appurtenant easement are sold together as an undivided entirety, precisely as conveyed by the mortgage, yet they are to be treated as so completely severed by the abandonment on the part of the mortgagor as that the easement is in fact extinguished, if the security of the mortgage debt has not been ultimately impaired by such abandonment. The solution of this question, which involves an examination into the extent and nature of the mortgagee's interest and estate is, we think, free from serious difficulty.

It is true that when the same person becomes the owner of the dominant and servient estates, and there is no intervening or outstanding interest or title held by some one else in or to the appurtenant easement, the unity of the two estates in the one individual necessarily extinguishes and merges the easement appurtenant to the dominant estate,

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because no person can have an easement in the land which he himself owns. *Capron v. Greenway*, 74 Md. 289. And it is equally true, that when the same person acquires both the dominant and servient estates, and conveys away the latter without reserving the pre-existing easement to himself, this operates as an abandonment by the grantor of the easement, in so far as it was enjoyed by him, for the reason that a grantor shall not derogate from his own grant. *Mitchell v. Seipel*, 53 Md. 269.

But neither an extinguishment in the mode indicated, nor an abandonment by the method just named, can be permitted to operate against a third party claiming an interest in the same easement, even though such third party be merely a mortgagee. The equity doctrine that a mortgage is a mere security for the debt and only a chattel interest has, by a gradual progress, been adopted by the Courts of Law, and the harshness of the common law, which looked to form only and treated a mortgage after condition broken as in all respects an absolute conveyance, has been materially mitigated. *Phelps Juridical Eq.*, sec. 196. Hence, as stated by CHANCELLOR KENT (4 Com. 160), "except as against the mortgagee, the mortgagor while in possession and before foreclosure, is regarded as the real owner." He has, therefore, an insurable interest in the mortgaged property, *Ins. Co. v. Kelly*, 32 Md. 421, and may recover damages for injuries done thereto. *A. & E. R. R. Co. v. Gant*, 39 Md. 140; *Arnd v. Amling*, 53 Md. 200; and notwithstanding a default is permitted to redeem in equity. *Bank of Commerce v. Lanahan, Trustee*, 45 Md. 407. But whatever his relation to the property may be as respects third persons, the doctrine that he is regarded as the real owner of the mortgaged property is subject to the express qualification that the mortgagee is not included. The doctrine applies "except as against the mortgagee." As between the mortgagor and mortgagee, "by the legal, formal mortgage * * * * the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an

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absolute legal conveyance, but subject to a proviso or condition * * * * * and upon non-performance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period." *Bank of Com. v. Lanahan, supra*; *Jamison v. Bruce*, 6 G. & J. 72; *Evans & Iglehart v. Merrikin*, 8 G. & J. 39. And in the recent case of *Cahoon v. Miers*, 67 Md. 576, where the question was whether the offspring born of mortgaged live stock, after the execution of the mortgage, belonged to the mortgagor or to the mortgagee, the late JUDGE MILLER, speaking for this Court, said, that our predecessors, in deciding the case of *Evans & Iglehart v. Merrikin, supra*, rested their conclusion upon the legal effect and operation of the mortgage as between the mortgagor and mortgagee. "They said," continues the opinion in *Cahoon v. Miers*, "and upon ample authority that a mortgage does something more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee and the right of possession follows as a consequence * * * * ; that this legal estate is defeasible at law upon the payment of the mortgage debt at the time stipulated, but if this is not done, then it becomes indefeasible at law and defeasible only in equity. * * * * From this view of the nature and effect of a mortgage, they say it results that the mortgagee must be considered as having an estate or interest in the subject-matter of the mortgage, not absolute, it is true, because such an estate is not imported by the terms of the instrument, but an interest commensurate with the object contemplated to be attained by it as a security for the payment of the debt." * * * * "But at law the title all the while is in the mortgagee. * * * * That decision (8 G. & J. 39) has been acquiesced in and recognized as the law of the State for more than half a century, and we see no good reason for overruling it now." As between the mortgagor and mortgagee, therefore, the doctrine that the mortgagor is regarded as the real owner, does not, and

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in view of the quality of the estate conveyed by the mortgage, cannot obtain to the extent of permitting the mortgagor by his own act to exempt from the lien and operation of the mortgage any part of the mortgaged property. It gives him no authority to dismantle the mortgaged estate of its appurtenant easements, and no power to force the mortgagee to accept as security for the payment of the debt, anything less than the entire estate originally granted. After the mortgage has been executed and delivered, and the security it was intended to afford has been accepted, it does not lie within the power of the mortgagor to withdraw or to cut out from the lien thus created any portion of the property actually conveyed. A contrary doctrine as between the mortgagor and mortgagee would jeopardize, if it did not wholly destroy, the stability of every mortgage security; and there is neither principle nor precedent to justify its adoption. It would lead to endless confusion, and would cause the mortgagee's lien, whose range and latitude ought to be fixed by the mortgage itself, to depend in a large measure upon, and to be gauged as to its scope by the accidental circumstance that the property as stripped of its appurtenant easements might happen to sell, when sold under foreclosure, for sufficient to pay the mortgage debt, instead of allowing the lien to cover during the whole period the mortgage remains in force the precise property originally conveyed.

As, then, there is by force of the mortgage, an estate or interest in the subject-matter of the mortgage vested in the mortgagee as between him and the mortgagor, which the latter cannot by his own act impair or alter, it necessarily follows, even if there were no explicit legislative enactment to the same effect, that the purchaser, under a sale made by the mortgagee, is entitled to precisely the same subject-matter which the mortgagee was empowered upon default to sell, and did in fact make sale of, according to the terms and pursuant to the powers contained in the mortgage. But the Code precludes all controversy as to this conclusion,

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for by sec. 11 of Art. 66 it is expressly declared, that "all such sales, when confirmed by the Court and the purchase money is paid, shall pass all the title which the mortgagor had in the said mortgaged premises at the time of the recording of the mortgage." By this provision the purchaser at the sale made by Whelan succeeded to the estate held by Dodson in the mortgaged premises at the time of the recording of the mortgage in 1877, and this estate included the right of way over the Duval lot. Such was undoubtedly the result of the sale when confirmed by the Court, and when the purchase money was paid by Taylor, the purchaser. *Dicks v. Logsdon*, 59 Md. 177; *Leonard v. Groome*, 47 Md. 504; *Warfield v. Ross*, 38 Md. 85. The deed which conveyed the mortgaged premises to Taylor, also in terms conveyed as part thereof, this identical right of way, and each succeeding deed, down to and including the one held by the appellee, expressly includes the same right of way. It results, then, from what we have said, that Becker owns that easement over the Duval lot, unless Hughes or Whelan, who became holders of the Dodson mortgage after Crowl undertook to close up the right of way, or Taylor or Bayless, who became successive owners of Lot A after its sale under the mortgage, acquiesced in Crowl's abandonment or closing of the right of way before the plaintiff purchased from Bayless. There is not the slightest evidence of such an acquiescence. It does appear that before Hughes purchased the Dodson mortgage from Loney he went in company with Bayless to examine the property; that Crowl explained to them his general scheme of improvement, but that nothing was said about the private road, and it was not called to the attention of any one by Crowl. It further appears that, after the sale under the mortgage, Becker also went upon the premises and saw that the road was obstructed by the terrace, but was informed by Bayless that notwithstanding the fact that Crowl had closed it up he, Becker, would be entitled to the right of way. This does not amount to an acquiescence that will

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extinguish the easement. Whilst it is settled that a party entitled to a right of way may abandon and extinguish such right by acts *in pais*, without deed or other writing, *Vogler v. Geiss*, 51 Md. 410, the acts done here were not done by the party against whom they are invoked, nor by any one under whom the plaintiff claims. The acts relied on were done by Crowl, against and not under whom Becker claims. No holder of the Dodson mortgage, and no one of the persons who have owned Lot A since its sale under the mortgage has done any act, much less any act of a "decisive character" (51 Md. 410) indicating an intention to abandon the easement. The mere cessor of use for a long space of time would be a strong fact to show an intention to abandon the right, *Reg. v. Charley*, 12 Q. B. 575; but even that circumstance does not exist in the case at bar.

We hold, then, that there was no error in granting the plaintiff's instruction; and for the reasons we have given, we further hold that the Superior Court was right in rejecting the defendant's first, second, third and fourth prayers. As a consequence the judgment appealed against will be affirmed with costs.

*Judgment affirmed with costs in this
Court and in the Court below.*

(Decided June 19th, 1895.)

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Syllabus.

MARY DeCHARMS GARRISON, BY NEXT FRIEND, *vs.*
SAMUEL E. HILL AND OTHERS.

Caveat to Wills—Within what Time to be Filed—Constitutional Law—Retroactive Statute—Vested Right—Persons under Disability—Title of Statute.

The Act of 1894, ch. 405, provides that no will shall be subject to caveat, or other objection to its validity, after the expiration of three years from its probate. Previous to this Act there was no limitation as to the time within which a caveat could be filed. *Held*, that since the Legislature could not rightfully give to this law a retroactive effect, it would be construed as prospective in its operation, and that under it proceedings against wills probated before the Act was passed must be commenced within three years from the date of the passage of the Act, and proceeding against wills thereafter probated must be commenced within three years from the date of the probate.

A retroactive effect could not be given to this Act, because if a will probated more than three years before its passage was really invalid, the heirs at law of the testator had a vested right in his property, and as the law then stood had a right to recover it. This vested right could not be taken away by a statute which took away at once all remedy.

The above Act cannot be said to be unconstitutional merely because there was no saving clause in favor of those under disability, such as coverture, infancy, etc. It is discretionary with the Legislature whether or not such persons shall be exempted from the operation of a Statute of Limitations, and unless the statute does exempt them they are governed by the same law that others are.

Where the title of an Act is to add an additional section to a certain Article of the Code, it is a sufficient compliance with the Constitution, Art. 3, sec. 29, which provides that the subject of every law shall be described in its title.

Appeal from the following order of the Orphans' Court of Baltimore City: "It appearing to the Court, from the petition and answer in this case, that probate of the will proposed to be caveated was made by the Court on the 6th day of February, 1889, more than three years before the passage of the Act of 1894, chapter 405; and the Court

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being of opinion that said Act is retroactive in its effect, and that accordingly the said petition has been filed too late, it is hereupon, this 26th day of March, 1895, by the Orphans' Court of Baltimore City, adjudged and ordered, that the said petition be and the same is hereby dismissed with costs."

The cause was argued before BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

John Prentiss Poe, Attorney-General, and Hyland P. Stewart, for the appellant.

Bernard Carter and William A. Fisher (with whom was Thos. Ireland Elliott on the brief), for the appellees.

It must be conceded that the rule adopted by this Court is to construe legislative enactments so as to give to them a prospective operation, unless the language imports with sufficient clearness the intent to include also a retrospective operation. But when the intention appears, it must be gratified, and the validity of the law must be determined upon this understanding of its object. *Williar v. Balto. Butchers' Association*, 45 Md. 555-6.

The language of the Act in question seems to import clearly a retrospective operation. "No will, &c., shall be subject to caveat, &c., * * after the expiration of three years from its probate." *Hepburn v. Griswold*, 8 Wallace, 607. And it is to be noted that the thing which is forbidden, unless done within a certain time, is the caveating of the will. When, therefore, the law declared that *no* will shall be subject to a caveat after three years from its *probate*, the language is not only broad enough to cover *all* wills, both those probated before as well as those probated after the passage of the Act of 1894, chapter 405, but the meaning and scope of the language cannot be gratified unless it is construed to include both classes of wills. If the intention had been to make the law applicable only to wills probated after the passage of this Act, and therefore only to one class of wills, certainly this would have been expressed,

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and the language, instead of being "No wills, &c.," would have been, "No will *hereafter probated*."

The Legislature had the power to pass the Act. In England, where the Parliament is supreme, and not restrained by a fixed and written constitution, the Legislature may pass retrospective laws, although they may operate upon contracts. *Moon v. Donden*, 2 Exch. (Wels. H. & G.) 27. In this State retrospective laws are not to be condemned unless they violate our own bill of rights, as *ex post facto* laws, or the provisions of the Constitution of the United States against the passing of laws to impair the obligation of contracts or divest some vested right. *Baugher v. Nelson*, 9 Gill, 305; *Williar v. Ballo. Butchers' Asn.*, 45 Md. 557.

In this case no contract is impaired, and there is no destruction of any right vested in the caveator. The filing of a caveat to a will was of no force at common law. It was merely cautionary to the Court, and there was no ground of complaint if it was disregarded. *Godolphin on Wills*, 258; 3 *Redfield on Wills*, 119; *Hitching v. Glover*, 1 Rolle, 191. Its force is derived from the statute in Maryland. 1 Hill, 329-330; 45 Md. 559; *State v. Norwood*, 12 Md. 205-6; *Williams v. Johnson*, 30 Md. 503.

No injustice is done to the caveator by this construction. The will in question was admitted to probate in February, 1889, and that of Miss Emma Johnson, under whom the caveator claims, in April, 1891; so that the caveator had three years, before the passage of the Act of 1894, chapter 405, within which to assert her claims, if there had been any foundation for them. The power of filing caveats without any limitation as to the time of doing so has been a great abuse. Caveators have failed to avail themselves of the right under the statute promptly when evidence on behalf of the will was yet accessible, and have waited until long after the death of the testators. Such delays would be unfair to the parties in possession of property under the fancied security of ownership in any case. But upon the trial of

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issues under a caveat, the doors have been opened so widely for the introduction of testimony, as to declarations and conduct of testators, that the opportunity for the production of false testimony, owing to impossibility of meeting it in many instances, is greater than in any litigations in the Courts.

There can certainly be nothing in the nature of a vested right to lie by, as this caveator has done, until years after the settlement of the estate, and until changes may have occurred from the efflux of time very disadvantageous to those deriving title under the wills. "There can be no vested right to do wrong." The Legislature possesses unlimited authority over the whole subject of the transmission of the property of a decedent.

BOYD, J., delivered the opinion of the Court.

The appellant filed on the 12th day of May, 1894, a caveat to the will of Maria M. Johnson, which had been admitted to probate on the 6th day of February, 1889. The Orphans' Court of Baltimore City dismissed it on the ground that chap. 405 of the Laws of 1894 was retroactive in its effect, and hence the caveat was filed too late. That Act is entitled, "An Act to add an additional section to Article 93 of the Code of Public General Laws of Maryland, to come in after section 326, and to be known as section 326 A." It provides that "no will, testament, codicil or other testamentary paper, shall be subject to caveat or other objections to its validity after the expiration of three years from its probate," and by section 2 it is made to take effect from the date of its passage.

It is contended by the appellant that the Act is unconstitutional, because (*a*) it is contrary to Art. 3 of section 29 of the Constitution of Maryland; (*b*) there is no saving clause to those under disability to sue, and (*c*) it is contrary to the Fourteenth Amendment to the Constitution of the United States.

It was conceded in argument that if the title had read,

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An Act to add an additional section to Article 93 of the Code of Public General Laws of Maryland, title, "Testamentary Laws," it would have been sufficient under the decisions in *State v. Norris*, 70 Md. 94; *Lankford v. County Commissioners*, 73 Md. 118, and other cases that might be cited. But the case of the *Second German American Building Association v. Newman*, 50 Md. 62, is directly in point, and is decisive of the first objection urged against this law. In that case the title was "An Act to amend Art. 95 of the Code of Public General Laws by adding an additional section thereto," and it was held to be a compliance with the constitutional provision requiring the subject of an Act of Assembly to be described in its title. There is no substantial difference between the title to that Act and the one now under consideration. This clause of the Constitution has been before us so frequently that we do not deem it necessary to do more than refer to the above cases without further comment on that question.

So far as the omission to insert a saving clause in favor of those under disability to sue is concerned, it might be said the appellant is not in a position to complain. She is now in this Court by her next friend, and could have so proceeded at any time since the will of Mrs. Johnson was probated. But the law cannot be said to be unconstitutional merely because it fails to extend the time in favor of those under disability, such as coverture, infancy, etc. It is discretionary with the Legislature whether or not they shall be exempted from the operation of the Statute of Limitations, and unless that statute does so exempt them they are governed by the same law that others are. *Vance v. Vance*, 108 U. S. 514; *Weaver v. Leiman*, 52 Md. 718.

Having disposed of the technical objections urged against this law, it remains for us to determine whether it is a bar to this proceeding. The statute is a very important one. Great injustice was possible to be done to devisees and legatees, as well as to testators themselves, by permitting caveats to be filed at any time, however long after the probate of

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wills. Designing parties could wait until the death of those familiar with the circumstances under which a will was executed before proceeding against it, and other dangers suggest themselves under the former practice in this State. The Legislature has, therefore, wisely undertaken to limit the time within which wills can be attacked.

The caveat filed by the appellant charges, amongst other things, that the alleged will of Maria M. Johnson was not, in fact, her will, but that she died intestate, and that it was not executed when she was of sound mind, capable of executing a valid deed or contract. It also alleges that appellant is the only heir at law and next of kin of Maria M. Johnson. If those allegations be true, then any real estate that Mrs. Johnson owned at her death became at once vested in the appellant, and she, as next of kin, was entitled to have the personality, after the payment of debts, etc., distributed to her. Section 309 of Art. 93 of the Code provides, that no will shall be good and effectual for any purpose whatever, unless the person making the same be at the time of its execution of sound and disposing mind, and capable of executing a valid deed or contract. Prior to the Act of 1894, it was the established law of this State that no lapse of time would exclude the inquiry whether a certain paper constituted the will of a party or not. *Emmert v. Stouffer*, 64 Md. 559; *Clagett v. Hawkins*, 11 Md. 387. The appellant, therefore, had a vested right in the property left by Mrs. Johnson, provided, of course, she can establish the facts alleged in her petition, and as the law stood she had the right to take steps to recover it. The Legislature had no power to take from her this vested right. It cannot be done on the theory that the law in question only affects the remedy, for, as was said in *Baugher v. Nelson*, 9 Gill, 299, an Act which divests a right through the instrumentality of the remedy, and under the pretence of regulating it, is as objectionable as if aimed at the right itself. The will of Mrs. Johnson was admitted to probate more than five years before the Act was passed. If, therefore, it be retroactive and valid against this

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will, all remedy is gone. It declares that no will shall be subject to caveat, or *other objection to its validity*, after the expiration of three years from its probate, and that it shall take effect from the date of its passage. A literal interpretation of the language used would seem to make the statute applicable to any proceeding, affecting the validity of any will, instituted after three years from the probate, even though the probate was more than three years before the passage of the Act. But such a construction implies that the Legislature intended to affect vested rights. Courts should so construe statutes as to uphold them, when possible to do so. The Legislature can unquestionably limit existing claims, provided a reasonable time is allowed after the passage of the Act for parties interested to institute proceedings, but it cannot bar a past right of action without providing a reasonable time within which suit can be brought. There is no difficulty in applying this statute to wills probated after the passage of the Act, nor would there be any legal objection to making it applicable to wills probated within such time before the Act was passed, as would still give those interested a reasonable time within which to commence proceedings, but, as it cannot be made retroactive so as to affect those that have been already probated three years or more, we think it fair to the Legislature to say that the intention was to give the law a prospective operation. Taking all the circumstances into consideration, it is apparent that the Legislature intended to apply this law to all wills, but did not intend to make it retroactive in its operation. We therefore think that the limitation fixed by the statute should commence to run when the proceeding to affect the validity of a will is first subjected to the operation of the statute, which in this case is the date of the passage of the Act. Although it may be said that this permits this caveat to be filed more than three years after the probate of the will, still it is within three years from the time the statute can lawfully affect it or apply to it. This construction was adopted in *Sohn v. Waterson*, 17 Wall. 596. In that case

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a suit was brought in Kansas on a judgment rendered in the State of Ohio more than four years before a statute was passed in Kansas, which provided "that all actions founded on any * * * judgment * * * rendered, etc., beyond the limits of this territory, shall be commenced *within two years next after the cause or right of action shall have accrued and not after.*" Although, strictly speaking, the right of action had accrued *six years* before the suit was brought in Kansas, the Supreme Court of the United States held that it would be presumed that the Legislature did not intend to make the law retroactive so as to bar suits or causes of action which had been due more than two years, and hence they determined that the limitation only commenced to run when the cause of action was first subjected to the operation of the statute—the time of its passage. The case of *Frey v. Kirk*, 4 Gill and Johnson, 509, decided by the former Court of Appeals of this State, is to the same effect. The Act of 1715, chap. 23, gave to persons beyond the seas when the causes of action accrued, the privilege of suing within the respective times prescribed by a former section of the statute after their return. The Act of 1818, chap. 216, repealed the exceptions or savings of such persons without any qualification, excepting that it was not to affect suits or actions then depending in any Court of Law or Equity in this State. The Court held that persons beyond the seas had the same time to bring their actions as they would have had had they resided in this State, and their rights had accrued on the day of the passage of the law. A literal interpretation of the statute, as it stood after the Act of 1818 was passed, barred the plaintiff's claim unless suit was brought within three years from the time it became due, but the Court construed the statute to give him three years from its passage.

Those cases are undoubtedly founded on correct principles. By following the construction adopted by them, we are enabled to avoid any interference with vested rights, and at the same time give force to the statute and make it

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applicable to *all* wills, whether probated before or after the passage of the Act, as was evidently the intention of the Legislature. Proceedings against those probated before the statute was passed must be commenced, if at all, within three years from that date, and against those probated after the passage of the Act, within three years from their probate.

It follows from what we have said that there was error in the order of the Orphans' Court of Baltimore City. It must therefore be reversed and the cause remanded for further proceedings.

*Order reversed and cause remanded,
with costs in this Court. The costs
below to abide the final result of
the case.*

(Decided June 20th, 1895.)

WILLIAM J. HOOPER ET AL. *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK ET AL.

Promoters of Corporations—Priorities Between First and Second Mortgage Bondholders—Simulated Payment for Shares of Stock—Vendor's Lien—Waiver—Receivers' Certificates—Liability of Stockholders—Cross-Bill—Bona Fide Purchaser of Bonds.

Where the promoters of a corporation, by falsely representing to a vendor that improvements of great value will be placed upon the property and paid for, induce such vendor to convey the same to the corporation and accept in part payment second mortgage bonds, so as to let in as a first lien certain first mortgage bonds which are held by the said promoters, who also issue to themselves shares of stock in the corporation upon which they pay nothing, then the lien of such first mortgage cannot obtain priority over the second mortgage for the unpaid purchase money.

Where the promoters of a corporation, by various devices, cause shares of stock to be issued as full paid, as if in consideration of property

acquired by the corporation, when in fact the property was not paid for by the shares, and the same are assigned to the promoters, who also hold the bonds secured by a first mortgage on the estate of the corporation, then such promoters cannot recover as creditors of the corporation and first mortgage bondholders without paying the amount due by them to the company as stockholders, if the rights of a vendor of the property to the corporation are thereby put in jeopardy.

A vendor's lien is not waived by a recital in the deed that the consideration has been paid ; and it prevails against the grantee and his privies in estate and against those claiming as volunteers, or even as purchasers for value, if they have notice that the purchase money remains unpaid.

When the property of a private corporation has been placed in the hands of a receiver, all expenses for safe-keeping and preservation are properly payable out of the income, or if there be none, then out of the proceeds of the *corpus* of the estate when sold.

But this power by no means includes authority in such case to allow the creation of liens through the medium of receivers' certificates which will take priority over existing liens.

A suit by a receiver, or by the creditors of a corporation, to enforce payment of unpaid subscriptions to the capital stock, is governed by the law of the domicil of the corporation.

A cross-bill may set up additional facts not alleged in the original bill, when they constitute part of the same defence and relate to the same subject-matter ; and though the allegations of the cross-bill must relate to the matter of the original bill, it is not restricted to the issues under it.

The promoters of a corporation, through their agents, bought certain land from H., it being agreed that \$100,000, being a part of the price, should be paid in second mortgage bonds of the M. Co., to be thereafter formed. This company's purpose was the manufacture of ice, and the contract with H. provided that machinery, etc., to the value of \$130,000, should be placed upon the property. One of the promoters guaranteed to H. the erection of the machines, and stated that he then had in his hands the funds necessary to pay for the same. This guaranty was not true and was not performed. The machines were furnished by the A. Co. under a contract reserving title to that company until payment of the price. Upon the faith of the guaranty H. executed a deed to the M. Co. of the property, and that company then executed two mortgages to a Trust Co.—the first to secure an issue of \$250,000 of M. Co.'s bonds, and the second to secure an issue of \$110,000 of bonds. Of these latter second mortgage bonds, \$100,000 were given to H. in pursuance of the contract of purchase, and \$10,000 in settlement of another transaction. The M. Co. issued shares of stock of the par value of \$500,000, stated to be issued for

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property purchased, but upon which, in fact, nothing was paid, the property having been purchased partly with money and partly with the \$100,000 second mortgage bonds. All of the shares of stock were assigned to the different promoters and their agents, and the said promoters were also the holders of the first mortgage bonds. Default having been made in the payment of interest on these bonds, the Trust Co., on behalf of the holders of the same, filed a bill for a receiver and foreclosure and sale, to which the M. Co. consented. Under this bill a receiver was appointed, who managed the affairs of the company and issued certificates of indebtedness. The A. Co., which had erected machinery on the mortgaged premises, intervened in the case and obtained a decree for the payment of its claim, the Court holding that the first mortgage bondholders were not *bona fide* purchasers without notice of the contract with the A. Co., but that the same was made by their agents. Some of the promoters paid the A. Co. and took an assignment of its decree against the M. Co. H., the holder of the second mortgage bonds, then came into the case by petition and filed a cross-bill and answer, claiming that the holders of the first mortgage bonds were not entitled to priority over the second mortgage bonds, so issued for the purchase money of the property, and that the first mortgage bondholders should be required to pay the amount due by them as stockholders in excess of the sum due to them on their bonds. *Held,*

1st. That the first mortgage bondholders were not *bona fide* purchasers of the bonds without notice, but were the real purchasers of the property and owe to the vendor the balance of the purchase money, and that since they induced the vendor to waive his lien in favor of the first mortgage bonds by the false representations contained in the guaranty, they cannot now claim a preference over the lien of the second mortgage bonds.

2nd. That the first mortgage bondholders are not entitled to a preference to the extent of the decree assigned to them by the A. Co., as against H., since they were really the debtors of the A. Co. and simply paid their own debt.

3rd. That a decree should be passed for the sale of the mortgaged property, and giving to the second mortgage bondholders, in the distribution of the proceeds, a priority, to the extent of \$100,000 and interest, and interest on overdue interest, over the first mortgage bonds, and also priority over the receivers' certificates and the decree of the A. Co. assigned to the first mortgage bondholders.

Appeal from a *pro forma* decree of the Circuit Court of Baltimore City. The case is stated in the opinion of the Court.

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The cause was argued before BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS and BOYD, JJ.

John Prentiss Poe, Attorney-General, and *Frank Gosnell* (with whom was *T. M. Lanahan* on the brief), for the appellants.

Appellants contend that the *pro forma* decree of the Circuit Court was erroneously passed and should be reversed, for the following reasons: 1. Because 4,990 of the 5,000 shares of the capital stock of the Maryland Ice Company was fraudulently issued as full paid stock, a large block of which is now, and always has been, held by the London Company and Poor & Greenough, who have never paid one dollar to the Maryland Company for the same, and therefore the amount thereof should be collected by the receiver and applied to the payment of the first mortgage bonds of said Maryland Ice Company, held by them, and said bonds to that extent decreed to be paid and extinguished. *Crawford v. Rohr*, 59 Md. 604-5; *Mish v. Main*, 81 Md.; *Sawyer v. Hoag*, 17 Wall. 610; *Camden v. Stuart*, 144 U. S. 105; *Lloyd v. Preston*, 146 U. S. 630; *Wetherbee v. Baker*, 35 N. J. Eq. (8 Stewart) 501-515; *Rice's Appeal*. *Ahl's Appeal*, 79 Pa. St. 168

The gross fraud perpetrated upon the public by the London Company and Poor & Greenough in organizing the Maryland Ice Company, and causing it to issue its bonds and stock to the extent of \$860,000 for property which cost but \$260,000, an over-valuation of more than 330 per cent., is only excelled by their audacity and assurance in offering the evidence of Sturgis, Greenough and Hammond, recently taken in this case for the purpose of creating the false impression that the London Company and Poor & Greenough were not among the associates of Hammond in making the purchase from the appellants, and had no connection with the Maryland Ice Company, except as *purchasers* of bonds and stocks, notwithstanding that this Court had already solemnly determined the contrary from the conclusive evidence, documentary and oral, appearing in the first record.

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2. The second proposition contended for by the appellants is, that having been induced to part with the legal title to the property in controversy, and having consented to take a second mortgage for the balance of the purchase money, *upon condition* and with the *distinct covenant and agreement* made by the purchasers of the property that the second mortgage *should be secured* by placing upon the property, *on or before the 1st day of July, 1890*, new machinery, etc., costing from \$130,000 to \$150,000, which undertaking was not complied with—and by reason whereof the corporation was placed in the hands of a receiver, and the claim of the second mortgage bondholders seriously, if not wholly impaired—they, the appellants, are entitled to be subrogated to the rights of the holders of all of the first mortgage bonds and holders of all the receivers' certificates, who were in fact themselves the purchasers of the property, as already *adjudicated* by this Court.

The evidence adduced by these first mortgage bond-holders, who are also the stockholders, is that, had the new machinery been placed upon the property at the time and in the manner agreed upon by the Arctic Ice Machine Manufacturing Company, the property would have been enhanced in value to the extent of at least \$500,000, the whole issue of the common stock; in fact, these bond-holders and stockholders actually now claim that this was the foundation for issuing that amount of stock as fully paid up and non-assessable. This aspect of the case is so fully covered by the discussion of the first proposition and the authorities cited, that it seems almost unnecessary to go over the grounds again. The position of the appellees is monstrous, that they should get possession of our property, induce us to take second mortgage bonds in part payment, *coupled with the condition* that these bonds should be secured beyond doubt by the erection of new machinery, &c., within a certain specified period, and then, because the parties with whom the purchasers contracted for such machinery make default, that appellants' claim shall be lost

It is but just and equitable that the appellants' claim should be decreed to be paid by postponing the lien of the first mortgage. There is no obstacle in the way of accomplishing this, as the parties who are now claiming a prior lien were the purchasers of the property, and contracted that such additional machinery, improvements, &c., should be placed thereon, as would ensure, beyond a doubt, the payment of the second mortgage bonds. The following authorities fully sustain this contention: *Fisher v. Shropshire*, 147 U. S. 133, 140, 141; *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509; *McDole v. Purdy*, 23 Iowa, 277; *Brown v. Bryan*, 65 Iowa, 374; *Huff v. Olmstead*, 67 Iowa, 598; *Yeoman v. Bell*, 29 N. Y. Supplement, 502; *Railroad Co. v. Lewton*, 20 Ohio St. 401; *Hooper v. Railway Co.*, 69 Ala. 529; *Florida Land and Imp. Co. v. Merrill*, 2 U. S. App. 434.

As to the receivers' certificates, it is conceded that they were issued without the consent of, and without prejudice to the rights of the appellants; consequently, the second mortgage bonds remain unimpaired thereby.

But apart from the "concession," the certificates are not liens upon the property prior to the appellants' mortgage, because the Circuit Court was without power to authorize their issue, the Maryland Ice Company being purely a private corporation.

John H. Thomas, for the Central Trust Company, appellee.

These stockholders had no connection with the Ice Company, except as purchasers of its bonds and stocks, and as supervisors of the organization, for the purpose of seeing that those bonds and stocks should be secured by its charter and resolutions. They made no contract with the appellants. They bought no property from the appellants. They assumed no liability to the appellants. If the Ice Company is not a valid corporation; if the resolutions under which its bonds, the foundation of the appellants' alleged claim, and its stock, the foundation of the stock-

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holders' alleged liabilities, were issued, are not valid, as contracts and acts of that corporation, then those bonds, the alleged foundation of the appellants' claim, and those stocks, the foundations of the alleged liabilities of the Investment Corporation and of Poor & Greenough, are all void, and the effort made in this proceeding to enforce against them such alleged liabilities, must therefore fail.

A stockholder of a corporation is not liable as such to any of the creditors of the corporation, except those who became such *while he was a stockholder*. *Weber v. Fickey*, 47 Md. 196; 52 Md. 500; *Coit v. Gold Am. Co.*, 119 U. S. 347; *Clark v. Beaver*, 139 U. S. 107; *Fogg v. Blair*, 139 U. S. 126; *Fort Nead. Bank v. Holden*, 129 U. S. 372; *Handley v. Stutz*, 139 U. S. 432.

The appellants did not rely on any individual liability of stockholders of the Ice Company, as part of their security. It is not necessary for the appellees, here, to contend that corporate creditors must prove, affirmatively, that they did rely on the liability of the stockholders. It has been affirmatively proven, in this case, that they *did not*. They contracted that no such liability should exist. These facts surely constitute a complete defence to the effort now made in these proceedings to enforce against the stockholders any alleged liabilities.

The appellants contracted to receive, *in payment for the property* they sold, \$150,000 in cash, and \$110,000 in second mortgage bonds. They have received the cash and bonds. Hammond has fully complied with his part of the contract, and the appellants have, as he contracted with the Ice Company that they should, executed a deed to that company. The appellants relied exclusively on their second mortgage and the corporate liability of the Ice Company therefor; not on any stockholder's liability. They stipulated that the first mortgage, which had priority over the second, should not exceed \$250,000; that additional machinery, to the extent of from \$130,000 to \$150,000, should be erected on the property, so as to render it suffi-

cient security for their mortgage. They would not execute their deed until they received from Poor & Greenough the letter and postscript set forth in evidence. If the property was worth only \$250,000, for which they sold it, the minimum of stipulated improvements, would make it worth, at least, \$390,000. This is \$140,000 more than the first mortgage ; leaving a margin of \$30,000 over and above their second mortgage, of \$110,000, as security for the latter. The bonds contain an express agreement, that the holders of them shall not be entitled to assert against the stockholders of the Ice Company, any individual liability, on account of those bonds. The appellants accepted those bonds, with that agreement, as part of them ; have had them registered in their names ; have kept them for over four years, and still keep them, with the authority of the Orphans' Court, as part of the estate of their testator ; received payment of two semi-annual coupons ; as long as the Ice Company was able to pay interest ; and have accounted for such interest, and distributed it among the beneficiaries under the will of their testator, as part of the income of their testator's estate. It is, surely, too late now to contend that any of the provisions of those bonds are void as against the holders of them. Corporate creditors may waive their rights, if they would otherwise have any, to the individual liability of stockholders. *1 Cook on Stocks, &c.,* section 216.

If it be contended that, under the contract of sale, the appellants are entitled to bonds of the Ice Company, in the ordinary form, without any stipulation that stockholders shall not be liable thereon, the reply is, that the contract of sale entitles the appellants to second mortgage bonds. It does not provide that such bonds shall not contain a stipulation, exempting the stockholders of the company from liability therefor. Bonds of the Ice Company, with the stipulations which they contain, exempting stockholders from liability therefor, are as much bonds of that company as if they had contained no such stipulation.

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A further reply to the contention that the appellants had rights, under their contract of sale, prior to the execution of the bonds, which affect the liability of the Investment Corporation and of Poor & Greenough is, that the Ice Company had not then been chartered. There were, then, no shareholders. Under the authorities hereinbefore referred to, the Investment Corporation and Poor & Greenough could not be individually responsible to the appellants, by reason of that contract. Another, and it is submitted, conclusive reply to such contention is that the Ice Company did not buy the property from the appellants. It *took title* from them, but *it bought* from Hammond. There was no resolution of the board of directors or of the stockholders which authorized the Ice Company to be substituted as purchaser from the appellants to the rights and liabilities of Hammond. The petition to the Orphans' Court, filed in the name of the Ice Company, was not authorized by any resolution of the directors or stockholders of that company. It was not authorized to contract, and did not contract any liability to the appellants, otherwise than by its bonds, executed by authority of the resolutions passed by the directors and stockholders in the forms prescribed by those resolutions. Those bonds exempt the stockholders from any liability therefor. They prohibit the holders from asserting such liability. A still further reply is, that the appellants' petition ; their cross-bill ; their answer ; all of their pleadings, claim as holders of these bonds. They are estopped from setting up any claim, in conflict with the above-mentioned provision therein.

The rights of creditors of a corporation to recover from a stockholder depend, in the absence of fraud on the part of the stockholders, entirely on the *contract between him and the corporation*. They are entitled to sequester for their benefit what he owes to the corporation. If he owes nothing to it they can recover nothing. Their rights against him depend on the same circumstances as those of the corporation against him, and are subject to the same limitations.

The decisions about to be referred to, in the New Jersey Courts and the Supreme Court of the United States, as to the difference between liabilities of those who subscribe for stock, or become transferees of subscribers; and those of stockholders who acquire "full paid stock" issued for "property purchased," are logical deductions from, and legitimate illustrations of this principle. They all decide, and the law seems well established, that the holder of stock, issued for "property purchased," is not liable to corporate creditors, unless there was actual fraud in the transaction. *Cook on Stockholders*, (3d ed.,) vol. 1, page 47, section 35; *Bickley v. Schlag*, 46 N. J. Eq. 533; *Clark v. Bever*, 139 U. S. 97; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Handley v. Slutz*, 139 U. S. 417.

As to the distinction between the liability of subscribers for stock and that of those who take stock, in good faith, in satisfaction of their demands, or for property purchased, see also *Camden v. Stewart*, 144 U. S. 105; *Memphis, &c., R. R. Co. v. Dow*, 120 U. S. 287; *Fort Madison Bank v. Alden*, 129 U. S. 372-8-9.

Even if the amount fixed upon as the proper amount of capital stock, on this basis, was inordinately large, and the property was improperly accepted for the bonds and stock, the appellants were not injured; still less were they defrauded thereby. They cannot, on that ground, hold stockholders responsible for corporate debts. Purchasers of the stock might complain. But none of them do. *In re Ambrose Lake Tin and Copper Co.*, L. R. 14 Ch. Div. 390; *Commonwealth v. Central Passenger Railway*, 52 Pa. St. 515; 1 *Cook on Stock, &c.*, section 46 and notes; *Granite Roofing Co. v. Michael*, 54 Md. 65-9 and 70.

The New Jersey Statute provides special means for enforcing liabilities, if any, of stockholders to corporate creditors. *Corporation Acts of New Jersey*, page 42, sections 93-4; *Weatherby v. Baker*, 35 N. J. Eq. 507; *Bickley v. Schlag*, 46 N. J. Eq. 532; 1 *Cook on Stock, &c.*, sections 220-24. These liabilities, if any, being the creatures of

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statute, the modes provided by the statute, which created them, for the enforcement of them, must be pursued. They are exclusive of all others. *Weatherby v. Baker*, 35 N. J. Eq. 507; *Bickley v. Schlag*, 46 N. J. Eq. 532; *Pollard v. Baily*, 20 Wall. 527; *Fourth Nat. Bank of N. Y. v. Franklyn*, 120 U. S. 747, 755-6-7-8; 1 *Cook on Stock, &c.*, sections 220-23-24.

The Investment Corporation and Poor & Greenough are not parties to these proceedings. The question of their alleged liabilities cannot properly be adjudicated in them. That can only be adjudicated in such actions, against them *in personam*, as are authorized by the New Jersey Statutes. The appellants may maintain such actions against them, if there be grounds therefor. The receiver cannot, even by authority of the Court. 1 *Cook on Stocks &c.*, section 218.

Wm. Pinkney Whyte and *Randolph Barton* (with whom was *Skipwith Wilmer* on the brief), for the Maryland Ice Company, appellee.

McSHEREY, J., delivered the opinion of the Court.

On March the twenty-first, eighteen hundred and ninety, the Maryland Ice Company was incorporated under the laws of the State of New Jersey. On the following fifth of April the Company acquired certain property situated in Baltimore City from the executors of the estate of the late William E. Hooper, deceased; and it acquired this property under an agreement previously made between the executors and Ormond Hammond, Jr., who contracted for himself and his undisclosed associates. The circumstances attending this acquisition of property will be stated later on. The price agreed to be paid was one hundred and fifty thousand dollars in cash (of which five thousand dollars were paid when the agreement was executed) and one hundred thousand dollars in second mortgage bonds of a company to be formed thereafter, which company, when formed, was the Maryland Ice Company.

In the contract of purchase, which bore date February the twenty-eighth, eighteen hundred and ninety, there were stipulations requiring the construction by the purchaser and his associates of certain betterments and ice manufacturing machinery upon the premises, to the value of one hundred and thirty to one hundred and fifty thousand dollars, to be erected by a designated time and to have a prescribed ice-producing capacity. Simultaneously with the execution of the deed by the executors conveying the property to the Maryland Ice Company the latter placed upon record two mortgages to the Central Trust Company of New York, each dated on the first of March and acknowledged on the third of April, and each covering the property so conveyed to the Maryland Ice Company by the Hoopers, and also covering all additions thereto and all machinery thereafter to be placed thereon. The first of these two mortgages secured an issue of two hundred and fifty thousand dollars of the Maryland Ice Company's bonds, and the second secured an issue of one hundred and ten thousand dollars of other bonds of the same company. These latter were delivered to the executors; one hundred thousand dollars of them in part payment of the purchase money as provided in the contract of February the twenty-eighth, and ten thousand dollars of them in settlement of another transaction which has no connection with the pending controversy. Prior to the incorporation of the Maryland Ice Company, Ormond Hammond, Jr., and Thomas Sturgis, acting for and in behalf of the promoters of the enterprise which finally culminated in the formation of the Maryland Ice Company, entered into a contract with the Arctic Ice Machine Manufacturing Company for the construction of three ice manufacturing machines to be placed upon this property. In the contract so executed on March the fifteenth, 1890, there was a clause expressly reserving to the Arctic Company the title in these machines, and the right to reclaim and remove them if the purchase price should not be paid when due. This contract was assigned to

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the Maryland Ice Company after its incorporation. The machines were, after some delay, finally erected, but were not fully paid for. The Maryland Ice Company having made default on September the first, 1891, in the payment of the interest coupon due that day on its first mortgage bonds, the Central Trust Company, representing and acting for the holders of those bonds, filed on the following day, in the Circuit Court of Baltimore City, a bill for the foreclosure of the first mortgage, and for a sale of the property, including the machines constructed by the Arctic Company, and which had not been fully paid for by the Maryland Ice Company. With the bill there was filed the unsworn answer of the Maryland Ice Company, consenting to a sale, and agreeing that a receiver be forthwith appointed. On the same day a decree was signed appointing O. Hammond, Jr., ~~receiver, and enjoining~~ the Maryland Ice Company and all persons from selling or disposing of any of the company's property. This whole proceeding, though ostensibly between different parties, occupying opposite sides of the docket, was, in fact, conducted by the same individuals, who, under other names, controlled both sides of the apparent controversy, because the Trust Company, the plaintiff, acted at the instance and in behalf of the first mortgage bondholders, and the Maryland Ice Company, the defendant, represented its stockholders, who were the same identical bondholders and their agents and co-projectors of the original undertaking. After the appointment of the receiver the Arctic Company intervened by petition, and asserted under the contract of March the fifteenth, 1890, made with Hammond and Sturgis, its ownership of the machines erected by it, but which had not been fully paid for. This claim was resisted by the first mortgage bondholders, on the ground that they were *bona fide* purchasers of those bonds, without notice of the unrecorded conditional sale made by the Arctic Company of the three ice-manufacturing machines. Whilst that controversy was pending, no further steps were taken with reference to

the foreclosure and sale. Ultimately the point at issue between the first mortgage bondholders, represented by the Central Trust Company, and the Arctic Company, reached this Court, and the case is reported in 77 Md. 202. Bearing in mind that the precise question controverted between the contending parties to that appeal was whether the holders of the first mortgage bonds were in fact *bona fide* purchasers thereof, without notice or knowledge of the title set up by the Arctic Company to the three machines erected by it under the contract made by Hammond and Sturgis on March the fifteenth, 1890, the pertinency of the conclusions reached on that subject in that case to the questions involved in the pending appeal, will be apparent. After a full, able and elaborate argument at the bar, we held that the London and New York Investment corporation and Poor & Greenough, who, it then appeared, together owned two hundred and forty-five thousand of the two hundred and fifty thousand dollars of the first mortgage bonds of the Maryland Company, and who, it now appears, between them own the entire issue, were in fact with Hammond and Sturgis the actual promoters of the scheme which resulted in the purchase of the property from the Hoopers, the making of the contract with the Arctic Company, the formation of the Maryland Ice Company and the issue of its first and second mortgage bonds. It was distinctly decided that the London corporation and Poor & Greenough had notice and knowledge of the provisions of the contract between the executors of Hooper on the one hand and Hammond on the other, wherein the latter agreed in behalf of himself and his associates that the betterments, to cost from one hundred and thirty to one hundred and fifty thousand dollars, should be placed upon the property; that they knew how and by what means the Hoopers were to be paid the amount of the agreed purchase money, and that they further knew the provisions of the contract between Hammond and Sturgis and the Arctic Company, which was subsequently assigned to the Maryland Ice Company. And

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they were held to have known these facts because, in the opinion of this Court, the London and New York Investment Corporation and Poor & Greenough were the real parties to these several contracts executed in their behalf by their accredited agents, Hammond and Sturgis. "It was," we said in 77 Md. 231, "for the London corporation, and at its instance, that Hammond negotiated the purchase with Hooper, and it was for it and for its benefit that he incurred the obligation to erect the three additional machines thereon; and it was to advance its interests that he and Sturgis entered into the contract with the Arctic Company. He and Sturgis were, therefore, in fact the agents of that corporation employed to develop the project for it, and the attempts to disguise their real connection with the London corporation are, whilst numerous and adroit, none the less transparent and obvious. * * * * * The priority asserted by the Central Trust Company for the holders of the Maryland Ice Company's first mortgage bonds is a priority claimed in behalf of the very persons whose agents and associates purchased the machines and contracted for the preservation of the vendor's lien thereon. The London corporation and Poor & Greenough, who are stockholders of the Maryland company, claim, as creditors of the very company which they organized and control, and whose obligations they were aware of, a priority over the vendor of the machines, notwithstanding the knowledge and information which they had and were chargeable with when they took the bonds, and notwithstanding the fact that the very priority which they are now seeking to defeat was one created by their own agents even before the bonds were issued. No Court has ever yet held that parties thus situated could successfully maintain such a position. It is the worst of bad faith." * * "As bondholders they have no standing to destroy or to impair the lien which, as projectors of the company, they through their own agents established in favor of some one else." Page 234.

Under the contract between Hammond and the Hoopers,

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of February the twenty-eighth, 1890, it was stipulated that Hammond should furnish a guaranty from Poor & Greenough, bankers, of New York, that the betterments and additional machinery provided for would be placed upon the property on or before the first day of the succeeding July. The object which the Hoopers had in view in insisting on these betterments is obvious. They desired to add to the security of the second mortgage bonds, which, in consideration of these betterments and improvements being made, they agreed to take as part of the purchase price for the property. And the object which the purchasers obviously had in view in giving the guaranty was to induce the vendors to waive their lien for the unpaid purchase money, so as to let in the first mortgage as a prior lien. Accordingly, before the delivery, and as a condition of the delivery by the vendors of the deed to the Maryland Ice Company, which had just been substituted in the executors' report of sales to the Orphans' Court as purchaser of the property in the place and stead of Hammond and his associates, who made the contract of purchase in contemplation of the incorporation of the company ; and before the grantors waived their vendor's lien in favor of the first mortgage bonds, a guaranty in the words hereinafter set forth was signed by Poor & Greenough and was given to the Hoopers.

Having determined in 77 Md. that the holders of the first mortgage bonds (who together with Sturgis and Lane are also the holders of the stock of the Maryland Ice Company) were not *bona fide* purchasers of those bonds without notice of the claim or lien of the Arctic Company, and that they were accordingly bound by the provisions in the latter company's contract of March the fifteenth, 1890, and were subordinated to the vendor's lien asserted by that company ; the case was remanded for further proceedings and proof respecting another branch of the controversy. It came here twice afterwards. 79 Md. 103, and 80 Md. xviii ; and when the amount due to the Arctic Company was finally and defi-

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nitely settled, a portion of it was paid and fifty thousand dollars of it were advanced by the London corporation, which took from the Arctic Company an assignment of the latter company's decree to that extent. Whether this decree in the hands of the London corporation under the assignment from the Arctic Company is a prior lien to that of the second mortgage, is one of the questions involved in the pending appeal.

From the day the original bill was filed down until about the sixth day of June, 1893, various sums were borrowed by the receiver on certificates issued under authority conferred by the Circuit Court. The money, aggregating over ninety thousand dollars, was furnished by the London corporation. The Hoopers, who held then and still hold the second mortgage bonds, never assented to the issuing of these certificates. Whether these receiver certificates held by the London corporation are a prior lien to the second mortgage, is another of the questions now before us for decision.

After the controversy between the Arctic Company on the one side, and the holders of the first mortgage bonds and the Maryland Ice Company on the other side, had been finally disposed of as above stated, the Hoopers, still holding the one hundred and ten thousand dollars of second mortgage bonds, came into the foreclosure proceeding case by petition and were finally made parties defendants. They obtained leave to file and did file a cross-bill, and they also answered the original bill. They incorporated the averments and statements of the cross-bill in their answer as parts thereof; and by both answer and cross-bill they insist that the holders of the first mortgage bonds are not entitled to a priority over the holders of the second mortgage bonds, for reasons to be stated later on; and they further claim that before the holders of the first mortgage bonds shall be allowed any part of the proceeds which may arise from a sale of the mortgaged premises they, the first mortgage bondholders, shall, as stockholders of the Maryland Ice

Company, pay to the receiver thereof the sum which the par value of the stock held by them amounts to in excess of the sum due to them on the first mortgage bonds. And these are the other questions presented on this appeal. The cross-bill concludes with a prayer for general relief, and it was answered by the Central Trust Company, by the Maryland Ice Company and by Hammond, the receiver. Considerable testimony was taken, and thereafter the cross-bill was dismissed by a *pro forma* decree, from which the pending appeal was taken.

At the outset, it is insisted that the relief sought by the cross-bill is so foreign to and irreconcilable with that which the original bill invoked, that the *pro forma* decree should, for that reason, be affirmed. It is undoubtedly true that a subject which is not germane to a pending controversy cannot by means of a cross-bill be injected into the litigation. A cross-bill is a mere auxiliary suit, and a dependency of the original. *Story Eq. Pl.*, sec. 399. Where a decree on the plaintiff's bill will not determine the litigation, the imperfection may be remedied by one or more cross-bills filed by one or more of the defendants against the plaintiffs; and if this has not been done and the difficulty appears at the hearing, the cause may be directed to stand over for the purpose. *Adams Eq.*, side-page, 402. The cross-bill may set up additional facts not alleged in the original bill where they constitute part of the same defence, and relate to the same subject-matter. *Underhill v. VanCortland*, 2 Johns C. R. 355. And though its allegations must relate to the subject-matter of the original bill, it is not restricted to the issues under it. *Nelson v. Dunn*, 15 Ala. 501. It is generally considered as a defence, or as a proceeding to procure a complete determination of a matter already in litigation in the Court, and therefore the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the Court. *Adams' Eq.*, side page 405; *Story Eq. Pl.*, sec. 399; *Mitf. Eq. Pl., by Jeremy*, 80-83. But the answer

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specifically relies, by way of defence to the original bill, upon the same matters set forth in the cross-bill, and these, if sustained, present an insuperable bar to the relief prayed in the original bill filed by the Central Trust Company, in so far forth as respects the alleged priority of the first mortgage bonds. With a single exception which will be adverted to hereafter, the relief sought, or the defence relied on in the cross-bill, is necessary to a complete determination of the relative priorities of the several liens now asserted; and that issue as to these priorities, which is of vital importance in the controversy, cannot be adjusted under the original bill, unaided by the cross-bill.

As we have stated, the original bill was filed to procure a foreclosure of the first mortgage, and it prayed that the proceeds of the foreclosure sale might be applied to the payment of the principal and interest unpaid upon the first mortgage bonds, together with interest on overdue interest down to the time of sale; and then, if there should be any surplus, that it should be applied to the payment of the second mortgage bonds. Now, the defences set up and relied on by the appellants present insuperable obstacles to the granting of so much of this relief as would give the first mortgage bondholders a preference over the second mortgage bonds. These defences, set up in the cross-bill and in the answer, assail the priority of the receivers' certificates, the priority of the Arctic Company's decree in the hands of the London Corporation, and finally the priority of the first mortgage bonds in the hands of that corporation, and in the hands of Poor & Greenough.

If the holders of the first mortgage bonds by any fraudulent device procured for their own benefit the execution and delivery of the deed by the Hoopers for the mortgaged property, and by the same means and for their own advantage secured a waiver by the grantors of their lien for the unpaid purchase money so as to let in the first mortgage as the first lien; then, upon the plainest principles of natural justice, they will not be allowed in a Court of Equity to en-

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force this lien of their own creation in their own favor to the prejudice of, or even in preference to, the lien of the vendors for the purchase money represented by the second mortgage bonds; even though the second mortgage bonds on their face declare that issue to be subject to the lien of the first. It is scarcely necessary to cite adjudged cases in support of a proposition so plain and self-evident as this. Courts of Equity will never allow the mere *form* in which a transaction is clothed or disguised by the parties who have projected it for their own gain, to control or defeat the legal or equitable rights of others; particularly where an adherence to *form* and a disregard of *substance* would result in the successful consummation of a palpably fraudulent scheme. *1 Pom. Eq.*, sec. 379.

To fully appreciate the relevancy of the defences made by the cross-bill and by the answer, we must rapidly sketch the further connection of these first mortgage bondholders with the Maryland Ice Company enterprise, and trace them through its various developments down to the present period.

After the contract of February the twenty-eighth, 1890, had been made, containing the stipulation respecting betterments and additional machinery, and the further stipulation providing for the guaranty by Poor & Greenough; and there had been inserted in the deed of April the fifth a recital with regard to the contemplated betterments, which recital, embodying the agreement in this particular of the projectors, became, in fact, a part of the consideration of the conveyance; the further organization and development of the Maryland Ice Company was progressed with. The London corporation, Poor & Greenough and Sturgis, fixed the capital stock of the company at five hundred thousand dollars, not one dollar on which has ever been paid by them or by any one else, except possibly one thousand dollars for ten shares put in the names of five individuals on March the twenty-fourth, 1890, for the purpose of effecting a formal organization. As one of the methods re-

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sorted to for the purpose of concealing or cloaking the real transaction, an agreement was entered into between Hammond and the London corporation, on the fourth of March, eighteen hundred and ninety, whereby he contracted to turn over to the Maryland Ice Company, when formed, the property purchased four days previously from the Hoopers; and to so turn it over for two hundred and fifty thousand dollars of first, and one hundred and ten thousand dollars of second mortgage bonds and five hundred thousand dollars of stock; but not one of the bonds went into his hands or was ever intended to go there, and a certificate for four thousand nine hundred and ninety shares of stock remaining after ten had been issued as just stated, was nominally issued to him, but in fact was merely handed to him with a request that he sign a transfer in blank on its back. This transfer he signed as directed, and it now appears filled out as an assignment of one thousand shares to the London corporation; four hundred and forty shares to Poor & Greenough; one thousand shares to Greenough, trustee; eight hundred and fifty shares to Sturgis; eight hundred and fifty shares to W. C. Lane, and eight hundred and fifty shares to Hammond. Only a few days subsequently a certificate for eight hundred and fifty shares was presented to Hammond by Sturgis with a request that he assign that also in blank, which was done, and it was then returned to Sturgis, and Hammond never saw it afterwards. No money or other consideration of any kind was paid to Hammond for this stock by the parties who received it; nor did Hammond ever pay or give to the Maryland Ice Company anything for it himself. As in fact the stock, with the exception of the ten shares before alluded to, all went to the promoters of the concern precisely as it was intended that it should go from the beginning, there was nothing due to Hammond for it, and consequently nothing was paid or given him. So completely was he a mere figurehead that even the five thousand dollars paid to the Hoopers when the contract of February the twenty-

eighth was made, was paid through Sturgis by the London corporation. The stock purports to be full-paid, non-assessable stock, and professes on its face to have been "issued for property purchased." The property, however, was purchased for two hundred and fifty thousand dollars through Hammond, but by the very parties who procured the stock; and the stock was not issued for the purchase at all, and no part of it was used therefor. The purchasers of the property—the London corporation, Poor & Greenough and Sturgis—through their selected representatives, who held the ten shares, voted that the stock be issued to Hammond, merely that he might immediately transfer it back to them; and this he did. Thus in effect they issued it, through a crafty device, to themselves as full-paid, non-assessable stock, though they paid nothing for it at all. They consequently owe the Maryland Ice Company for this stock, and by no subterfuge or artifice, however cunning, can they evade their liability in this respect when that liability is sought to be fastened upon them by a party entitled to resort to it to secure payment of a claim due by the Maryland Company. "It has again and again been decided that the unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of the general creditors of the corporation; and that this trust cannot be defeated or the fund impaired by a simulated or pretended payment for the stock taken, nor by any device short of actual payment in good faith. Any arrangement, therefore, among the stockholders or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not, in fact, getting the benefit of the price in good faith, will be regarded as a sham, and not a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscribers."

Crawford, Bixler et al. v. Rorer, 59 Md. 604; *Camden v. Stuart*, 144 U. S. 105; *Floyd v. Preston*, 146 U. S. 630; *Washburn v. Green*, 133 U. S. 30; *Hatch v. Dana*, 101 U.

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S. 205. As against a creditor of the Maryland Ice Company, this acquisition of alleged full-paid, non-assessable stock, without the payment of a single cent, would be grossly fraudulent; and to permit holders of such stock, who, as promoters of the company, occupied the position of agents in procuring for the projected company the property upon which its mortgages were afterwards fastened, to claim and recover in the capacity of first mortgage bondholding creditors of that company, *from* that company, an amount equal to the sum due by them *to* the same company, and due in their capacity of stockholders for stock actually issued, but not paid for, without requiring them first to pay what they themselves owe, would be a flagrant injustice to the vendors of the mortgaged property, if the lien of the latter for unpaid purchase money were thereby put in jeopardy. It is true as a general principle that to render a stockholder individually liable to the extent of his unpaid subscription, at the suit of a creditor of the corporation upon a debt due by the corporation to the creditor, the stockholder must have been such at the time the debt was contracted. *Weber v. Fickey, use of Lanahan*, 47 Md. 196; S. C. 52 Md. 500; *Handly v. Stutz*, 139 U. S. 417; *First Nat. Bk. of Deadwood v. Gustin-Minerva Cons. Mining Co.*, 42 Minn. 327, S. C. 6 L. R. A. 676; *Hahn & Bros. Appeal*, 5 Cent. R. 187; *Morawetz on Corp.*, secs. 832, 833. But we are not confronted with that question, because no decree is asked against the stockholders to require them to pay the second mortgage bonds; but merely a decree directing the receiver to collect the unpaid subscriptions to be applied by the Maryland Ice Company, when collected, to the extinguishment of the first mortgage bonds. Nor, for the same reason, does the provision in the second mortgage bonds to the effect that no liability on that bond shall ever be enforced against the individual estate of any stockholder of the Maryland Ice Company, interpose any difficulty as the case now stands. If suits should be brought hereafter by the receiver or by creditors to enforce payment for these unpaid shares, the

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law of the corporation's domicile would govern and control. *First Nat. Bk. of Deadwood v. Gustin Minerva Co., supra.* But this branch of the subject is not before us now and need not be discussed, because this feature of the relief sought by the cross-bill is obviously foreign to the object of the original bill, and such relief could not properly be granted in the pending proceeding, though the improvident joinder of this particular subject will not affect the jurisdiction of the Court to decree relief as to the subjects which are properly included in the cross-bill. *Code, Art. 16, sec. 161.* The fact of the indebtedness to the Maryland Ice Company, by its first mortgage bondholders in their capacity as its stockholders, whilst furnishing no ground in this proceeding for a decree directing the receiver to collect the amounts not paid on the stock, is a circumstance which reflects strongly in a Court of Equity on the good faith of these same bondholders in pressing for a sale of the mortgaged property whilst they are largely indebted to the company; and it is a circumstance which exhibits them in the light of attempting to shut out the second mortgage altogether at the very time when, being thus indebted, they are seeking equitable relief in their own behalf, though refusing to do equity themselves. These first mortgage bondholders are the real plaintiffs to the original bill. They were in fact the real purchasers of the property bought from the Hoopers. They were the promoters of the Maryland Company, and though they did not get possession of the certificates of stock until April the seventh, 1890, yet, under the contract of March the fourth, between Hammond and the London corporation, and under the antecedent arrangements between the same parties and the other promoters of the scheme, they were from the beginning to become owners of the stock without giving an equivalent therefor. As the real purchasers of the property, they owe to the vendors the balance of the purchase money which they contracted to pay. Through the Maryland Company, which they organized and own, they have become holders

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of two hundred and fifty thousand dollars of its bonds that are on their face a first lien upon the property which they bought ; and they now seek, as though they were total strangers to the original transaction, and were only connected with the Maryland Company as *bona fide* holders of its bonds, to sell for their own benefit the mortgaged property to the obvious prejudice of the subsequent lien held by the vendors, and created by these same projectors, though as stockholders they owe the company quite as much as they now endeavor in the capacity of bondholders to recover from it. If, whilst they are largely indebted to the company for the stock thus acquired by them without any consideration paid or promised, they be permitted as holders of the first mortgage bonds to sell the property, and thereby strike down the second lien, which they themselves created, and which is held by persons from whom they bought the property, which was bought under stipulations they have not complied with, as will be pointed out further on ; the device to which, in the very inception of the undertaking they deliberately resorted "to evade the law and accomplish that which is forbidden," (*Memphis, &c. v. Dow*, 120 U. S. 287), will succeed under the very eyes, and still worse, by the potent aid of a Court of Equity. The Hoopers, whilst not seeking by their answer or by their cross-bill to recover a decree against the stockholders for the payment of the second mortgage bonds out of the amounts due on the stock, resist the claim of the holders of the first mortgage bonds to have the property sold so long as the latter owe to the Maryland Company the par value of this unpaid stock. In a word, they invoke the familiar and salutary doctrine that he who seeks equity must do equity. This doctrine, in its broadest sense, may be regarded as the foundation of all equity, and as the source of every rule of equity jurisprudence, since it is undeniable that Courts of Equity do not recognize and protect the equitable rights of litigant parties unless such rights are, in pursuance of the settled juridical notions of morality, based

upon conscience and good faith. "Whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the Court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of, or necessarily involved in, the subject-matter of the controversy." *1 Pom. Eq.*, sec. 385.

The guaranty given by Poor & Greenough is in these words: "New York, March 31st, 1890. Messrs. Wm. J. Hooper *et al.* Gentlemen:—Referring to a contract between yourselves and Ormond Hammond, Jr., dated February 28th, 1890, wherein it is stipulated that we shall arrange a guarantee that the proposed Maryland Ice Company shall erect additional machinery for manufacturing ice to the extent of one hundred and fifty tons per day, to be placed at once upon the property herein described, we now beg to state that the Arctic Ice Machine Manufacturing Company has entered into a contract for the furnishing of ice machines in accordance with the stipulation, and E. J. Codd Co. have entered into a contract to supply boilers, etc., completing the manufacturing outfit; which contracts, together with the improvements now being made, will aggregate a cost in excess of \$130,000. These contracts we are assured are from thoroughly responsible people and supply the guarantee which you desire. We remain, gentlemen, very truly yours, Poor & Greenough. P. S.—New York, April 5th, 1890. The Maryland Ice Company *has deposited with us the funds called for by the within described contract, and we hereby agree that they shall be applied in accordance therewith.* Poor & Greenough." The execution of this guaranty was a condition, and a material condition, upon which the Hoopers were induced to allow the lien of the first mortgage to take precedence over their vendors', or more properly speaking, their grantors' lien for the deferred purchase money. This is placed

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beyond doubt by the statement contained in their report of sales to the Orphans' Court of Baltimore City and by the recital in their deed to the Maryland Ice Company, and by all the circumstances surrounding the whole transaction. By the explicit terms of the guaranty and by the recital in the deed the grantors, the Hoopers, were entitled to have the additional security contemplated by both the guaranty and the deed. It was upon the faith of the assurance given by Poor & Greenough in the guaranty of April the fifth, that they then had in their hands sufficient funds of the Maryland Ice Company to pay for the betterments and additional machinery, that the Hoopers let in the lien of the first mortgage in favor, as it now turns out, of the very parties who purchased, and now, under the name of the Maryland Ice Company, still hold the property. If, as we have heretofore held, and there is nothing in the present record to induce a change or modification of our former opinion, the London corporation was one of the promoters of the Maryland Company and was therefore a party to all that was done in the organization of that concern and in the acquisition for it of the property purchased from the Hoopers, then the London corporation was not only aware of the guaranty given by Poor & Greenough, but is bound by it and is affected equally as they are with all the consequences resulting from a deception practiced upon the vendors by means of any false statements contained in that guaranty. If the holders of the first mortgage bonds secured for themselves, under and by the first mortgage, a priority over the lien representing the unpaid purchase money due to the vendors, and secured that priority by inducing the vendors to let in the first mortgage lien because of the assurance given by Poor & Greenough for and in behalf of all the projectors that they, Poor & Greenough, had in hand sufficient funds of the Maryland Ice Company with which to pay for the stipulated betterments, when in point of fact that assurance was utterly untrue and they did not have those funds in hand at all; it surely cannot be

that a Court of Equity will, at the instance of the holders of a first lien procured by themselves in that way, allow the mortgaged property to be sold to the detriment of the vendors who have been thus deliberately imposed on and deceived. A first lien obtained over the vendors' or grantors' lien by means of a false representation of such a material inducement leading the vendors to postpone the priority of their purchase money lien is nothing less than flagitious fraud, which, upon its being unmasked and exposed, no Court will countenance or suffer to prevail. The equity acquired by a party who has been misled is superior to the interest in the same subject-matter of the one who wilfully procured or suffered him to be thus mislead. *2 Pom. Eq.*, sec. 686. The priority resulting from order of time merely, or that resulting from the superior nature of the equity itself, or that belonging to a legal title may be postponed or defeated in various manners and by various incidents, among which the most important are, notice given to or fraud or negligence of the holder of the interest which would otherwise have been preferred. *2 Pom. Eq.* secs. 716, 726, 731.

Was the guaranty untruthful? It is clear beyond controversy, that when Poor & Greenough gave the guaranty in the postscript of April the fifth, they did not have and had not had in their hands, and never did have afterwards, and they certainly never did apply, the funds which they declared they then had and that they would thereafter apply in payment for the machinery mentioned in the contracts, to which the guaranty made reference. It was not until that declaration contained in the postscript, heretofore quoted, had been actually reduced to writing and had been signed, that the Hoopers allowed the Maryland Company, which is merely another name for the bondholders, to have the property. It is perfectly clear that a large part of the money borrowed from the London corporation on receiver's certificates, was used to pay in part for this very machinery which Poor & Greenough declared in the guaranty they

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then held, sufficient of the Maryland Company's money to pay for. It is further disclosed by the record, that the fifty thousand dollars, which the London corporation claims as a prior lien over the second mortgage bonds by virtue of the Arctic Company's decree that was assigned to the London corporation, as heretofore stated, constitute nearly one-half of the total contract price agreed to be paid to the Arctic Company for the three ice manufacturing machines, which are the identical machines that Poor & Greenough unequivocally declared in the guaranty of April the fifth, they had at that time in their hands the money of the Maryland Company to pay for. We have not overlooked that part of Greenough's testimony where he undertakes to explain away the evident meaning of the guaranty, by saying it was perfectly well understood by the Hoopers and himself that the guaranty only had reference to the *cash* payments to be made for the machinery, and did not include the deferred payments. But this will not stand the test of investigation, for the plain reason that the *cash* payment to the Arctic Company had been made on April the third, two days prior to the date of the postscript, as shown by a statement of expenditures furnished by Greenough himself, and according to Sturgis' diary the payment had been made on March the fifteenth. Whichever statement as to the time of making the payment be accepted, the cash payment to the Arctic Company had been made *before* the guaranty was given; and, therefore, obviously, the declaration that Poor & Greenough had in their hands or on deposit with themselves the funds called for by the contracts, meant, and could only have meant, *all* the funds agreed to be paid for the machinery. If the testimony of Sturgis, as contained in the first record that came before us, be true, the Maryland Company never did have at any time any funds on deposit with Poor & Greenough, and consequently the statement in the postscript of April the fifth was absolutely false. So far, then, from the guaranty being true, much of the money claimed by the London corporation under the

receiver's certificates, and all of the money claimed by it under the Arctic Company's decree, are sums which ought to have been paid absolutely and unconditionally according to the guaranty, to strengthen the lien of the second mortgage. They were not mere loans which should take precedence over that lien. The attempt to collect them in advance of the second mortgage is a direct, continuing breach of the guaranty.

Now the vendors' lien exists for unpaid purchase money, even though a deed has been executed and possession of the property has been delivered. *Schwartz, Guardian, v. Stein*, 29 Md. 112. Perhaps it would be more technically accurate to call the lien a grantor's lien after the deed has been delivered. 3 *Pom Eq.* sec. 1249, note. The vendor's or grantor's lien is not waived by a recital in the deed that the consideration has been paid. *Thompson v. Corrie*, 57 Md. 200; 2 *Story Eq.*, sec. 1225, and it prevails against the grantee and his heirs and other privies in estate, and against those claiming as volunteers or even as subsequent purchasers for value if they have notice that the purchase money or any part thereof remains unpaid. *Schwartz v. Stein, supra*. The London corporation and Poor & Greenough and their associates created a lien in their own favor—the first mortgage lien—they created it on a condition insisted on by the grantors and inserted in a guaranty and in the deed for the grantor's benefit. They, the parties giving the guaranty and accepting the deed, have violated that condition, and in spite of this they now ask a Court of Equity to enforce their lien thus procured, and to enforce it over and in preference to a grantor's lien, which was only waived or postponed in favor of the first mortgage upon a condition which the holders of the first mortgage bonds made and have flagrantly disregarded. No authority has been cited in support of such a demand as this, and we apprehend none can be found under any system of jurisprudence where the most elementary precepts of ethics pervade the administration of justice. "If the facts relied

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on show deception, as where misrepresentations were intentionally made for the purpose of deceiving the defendant, and he relied upon and was deceived by the same, and thereby was induced to enter into a contract which, but for the fact of such deception, he would not have done, a Court of Equity will relieve against the contract and refuse to enforce the same, whether it be accompanied by damage or not." 2 *Warvelle on Vendors*, 752. And this is so upon the theory that a Court of Equity will not make itself an instrument to carry out fraud.

It is, therefore, we think, obvious that these first mortgage bondholders who acquired a prior lien over the grantors' lien by means of the false representations made by Poor & Greenough, in behalf and with the knowledge of all the parties who were intended to take and did take the entire issue of those bonds, should not be allowed to profit by the fraud of which they were guilty ; and that in the distribution of the funds which may arise and be realized on a sale of the mortgaged property, these first mortgage bonds must be subordinated to one hundred thousand dollars of the second ; that is to say, that one hundred thousand dollars of the second mortgage bonds must be first paid in full with their accrued interest and interest on overdue interest coupons before the first mortgage bondholders shall be permitted to receive any part of the proceeds of sale. It is no answer to say that sometime after the first day of July, 1890, the guaranty was complied with to the extent of there being on the premises ice manufacturing machines which produced daily the quantity of ice specified in the contract with the Hoopers. The other features of the guaranty have never been observed. The Hoopers were entitled to rely on the guaranty as it was written, and having waived their lien or deferred it only because the guaranty was given, if the material statements in that guaranty are false and were false when made, and have not been complied with, the deceived and defrauded vendors are not bound by their waiver, and may assert their lien against the land in the hands of those

who were parties to the whole transaction and fully cognizant of all its details. You cannot hold them to their waiver of their lien except upon the terms on which they agreed to waive it; and you cannot make some other and different terms, and then say to the vendors that these are as beneficial as those actually agreed to. The vendors are not obliged to accept other conditions, and as those upon which their waiver was founded have been broken, they may reassert their lien in preference to the lien of the first mortgage which will accordingly be displaced. *The Slide and Spur Gold Mines v. Seymour*, 153 U. S. 509; *McDole v. Purdy*, 23 Iowa, 277; *R. R. Co. v. Lenton*, 20 Ohio St. 401.

We attach no importance to the fact that the bonds held by the Hoopers are declared on their face to be subject to the prior lien of the first mortgage, because that is precisely the relation they would have held, but for the fraud and deception to which we have adverted. Nor do we consider the action of the commissioners appointed to make partition of the estate of William Hooper, deceased, in affixing no value to these bonds, as at all bearing on the questions before us.

It is perfectly clear that the London corporation cannot assert as against the Hoopers the lien of the Arctic Company's decree. That decree was obtained, as we have said, against the Maryland Company for the balance of the money due for the very machines, which, under the contract made by Hammond, on February the twenty-eighth, 1890, in behalf of the London corporation and Poor & Greenough, with the Hoopers, were to be placed upon the property by the first day of July. When ultimately placed there, the Arctic Company obtained a decree for the balance of the purchase money due for them, and the London corporation, one of the original projectors, and, in fact, one of the actual purchasers of these very machines, advanced fifty thousand dollars of the amount decreed to be paid, and took an assignment of the decree. When the London corporation paid this sum of fifty thousand dollars to the Arctic Com-

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pany, it did merely what, as the real purchaser of the machines, it was legally bound to do—it simply paid its own debt; and it cannot, by taking an assignment of, instead of a receipt for, that debt, convert itself from a debtor of the Arctic Company into a creditor of the Maryland Company, as against the second mortgage bondholders, whatever may be its rights, under the assignment, as between itself and the Maryland Company.

With reference to the receiver's certificates we have no difficulty. When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safe keeping and preservation are properly payable out of the income, if there be any, or if there be none, then out of the proceeds of the corpus of the estate when sold. But this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. "Extensive as are the powers of Courts of Equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of Courts to uphold and enforce them against all subsequent encumbrances." *Farmers' Loan and Trust Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481; S. C. 16 L. R. A. 603. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receivers' certificates, and then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. In *Wood v. Guarantee Trust & S. D. Co.*, 128 U. S. 421, the Supreme Court said: "The doctrine of *Fosdick v. Schull*," 99 U. S. 235, "has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between

such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out." And in *Kneeland v. Am. Loan & T. Co. of Boston*, 136 U. S. 89, the same tribunal, in speaking of the power of a Court of Equity to displace the lien of a railroad mortgage, said: "Upon these facts we remark, first, that the appointment of a receiver vests in the Court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases, this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a Court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some Courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So when a Court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this Court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage lien. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there

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seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." See also *Bound v. South Carolina R. R. Co.*, 50 Fed. Rep. 312; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.*, 68 Fed. Rep. 623. It would be exceedingly dangerous to concede to a Court of Equity the power to displace, in favor of receivers' certificates, subsisting liens on the property of private corporations, or of individuals. No mortgage lien would ever be secure if it were liable to be postponed to subsequent obligations created by a receiver. If the power exists at all, apart from the case of a railroad mortgage, there is no reason for denying its applicability to every species of mortgage, and a mortgagee might suddenly discover that what he believed to be an ample security, has been utterly destroyed and swept away by intervening liens created subsequently, by an order of the Court. We are unable to give our assent to such a doctrine.

In concluding this opinion it is proper to observe that the ten thousand dollars of second mortgage bonds, which formed no part of the consideration of the purchase from the Hoopers, but which related to another and distinct transaction, whilst subordinate to the first mortgage bonds because not representing unpaid purchase money, are entitled to priority over the Arctic Company's decree in the hands of the London corporation, and to priority over the receiver's certificates.

As a result of the views we have expressed, the *pro forma* decree dismissing the cross-bill will be reversed, and the cause will be remanded, that a decree may be passed directing a sale of the mortgaged property, and giving to the appellants, in the distribution of the funds arising from the sale, a priority over the first mortgage bonds as to one hundred thousand dollars of the second mortgage bonds, with the overdue interest thereon, and interest on that overdue interest down to the day of sale; and likewise giving to the appellants as to said one hundred thousand dollars of second mortgage bonds

with accrued interest, and interest on overdue interest, a priority over the receiver's certificates, and over the Arctic Company's decree in the hands of the London Company, or anyone claiming under it; and further giving a priority as to the remaining ten thousand dollars of second mortgage bonds over the receiver's certificates, and the said Arctic Company's decree.

Pro forma decree reversed, with costs above and below, and cause remanded, that a decree may be passed in conformity to this opinion.

(Decided June 20th, 1895.)

LOUISA WALLACE *vs.* HERMAN SCHAUB, ADMINISTRATOR OF HENRY TROEMNER.

Contract Implied from Acceptance of Services—Evidence of Value of Services—Plea of Limitations.

A. boarded with the plaintiff for a number of years, paying a certain sum for board and lodging. For some years before his death he was frequently ill, and was constantly nursed by plaintiff, and for these services A. promised to pay, but no price was fixed. In an action against his administrator to recover for the same, *Held*, that there was evidence sufficient in law to establish a contract to pay for such services, there being no relationship between the parties.

In the above action, the evidence of a trained nurse, acquainted with the value of the services of nurses, trained and untrained, is admissible to show the value of the services rendered by the plaintiff.

In an action against an administrator on a contract made by his intestate, a plea that "the alleged cause of action did not accrue within three years of the decedent's death," is a sufficient compliance with the language of the statute.

Appeal from the Baltimore City Court (WRIGHT, J.)
The case is stated in the opinion of the Court.

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Argument of Counsel.

The cause was argued before ROBINSON, C. J., BRYAN, MCSHERRY, FOWLER, BRISCOE, PAGE and ROBERTS, JJ.

T. R. Clendinen and *Charles S. Watts* (with whom was *Wm. C. Smith* on the brief,) for the appellant.

If the services were rendered by the appellant gratuitously, she is not entitled to recover; but the burden of proving this fact is upon the appellee. As between strangers, living together as a family, contracts for compensation will be implied unless the contrary is shown, either expressly or impliedly, from the affirmative circumstances expressly shown to exist in the case. *Thornton v. Grange*, 66 Barb., 507; *Phillips v. Jones*, 1 A. & E., 333; *Jacobson v. Executor of Le Grange*, 3 Johnson, 199. The only questions to be decided are whether these services were rendered gratuitously or under a mutual understanding, expectation or design that compensation was to be paid, and as these questions are matters of fact and not of law, the lower Court was clearly wrong in withholding the case from the consideration of the jury. *Phillips v. Jones*, 1 A. & E. 333.

The consideration of the second part of the prayer, viz: that there is no evidence legally sufficient to establish the pecuniary value of the services is, more or less, closely involved in the argument upon the question giving rise to to the third bill of exception, that is to say, of the admissibility of the evidence of Catherine Beecroft, the witness produced on behalf of the plaintiff to establish the value of the services rendered Henry Troemner. She was shown to have been a lady of undoubted experience, both as a trained, and what is called an "experienced nurse," that is say, "a mother, or any one who has had anything to do with sick people, it does not matter whether she goes out for compensation or not," and one who was acquainted with the subject as to which she was called upon to testify. Such evidence was the very best evidence that could be produced to enable the jury to arrive at an estimate of the services of the appellant. Evidence of this character, on

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the supposition that credit is to be attached to the witness, is a better guide to truth and justice than the opinions of those whose occupation or experience do not give them practical knowledge as to the matters and facts as to which they are called upon to testify. *Hatton v. Weems*, 12 G. & J. 111. Opinions of questions of value, by persons who are acquainted with the subject as to which they testify, are always received. *Kendall v. May*, 10 Allen (Mass.) 59; *Eldridge v. Smith*, 13 Allen (Mass.) 140.

L. P. Hennighausen and Emil Budnitz, for the appellee.

The testimony is that the appellee's intestate paid for his board and lodging at the rate of \$18 per month, regularly, except the last month of his life; so the first item is no part of this action, and only the claim of \$1,200 for care and attention while sick, and \$375 for bed clothing and care of the same, and the sufficiency of the testimony offered in support of the same are under consideration. We call attention to the long period of time—over twelve years, that these services are alleged to have been rendered; that his most protracted sickness occurred twelve years before his death; that the appellant and intestate had frequent settlements of money matters; that he paid for his board and lodging regularly, and during that entire period no demand was ever made by the appellant for the money sued for, although she was totally without means and depending upon her daughter for support. That if there was a real debt of \$1,592.50 the appellant would be entitled to interest, and the intestate liable to pay it, and he would have settled the claim during the long period of time. That the usual care and attention given to a permanent boarder, of many years, during temporary sickness, are incidents of human life and not expected to be paid for extra, unless there is an understanding to that effect, and mere expression of gratitude and acknowledgment of kindness raise no presumption of a contract to pay extra for the same. In order to justify a claim for services rendered a decedent, there must have been a

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design, at the time of rendition, to charge, and an expectation on the part of the recipient to pay, for the services. *Bantz v. Bantz*, 52 Md. 686, 693.

PAGE, J., delivered the opinion of the Court.

This action was brought by Louisa Wallace to recover for certain services alleged to have been rendered by her to the defendant's decedent. The *narr.* contains eight counts ; the first six are the usual money counts ; the seventh and eighth set up special services rendered by the plaintiff to the deceased at his request. The defendant pleaded the general issue pleas, and (third) "that the alleged cause of action did not accrue within three years of the decedent's death." The plaintiff moved to strike out the third plea, and the refusal of the Court to grant the motion constitutes the first exception. The plea of limitations is not a plea to the merits, and being so regarded must be received with strictness ; *Nelson v. Bond*, 1 Gill, 221 ; yet it need not be set out in the words of the statute ; a plain statement of such facts as may be necessary to form the defence being all that is required. *Code*, Art. 75, sec. 3 ; *Gott v. State*, 44 Md. 336. The record shows that the suit was brought against the administrator of Henry Troemner, the decedent. The plea is that the alleged cause of action did not accrue within three years of the decedent's death ; and if that was so, it must have accrued more than three years before the bringing of the suit.

Having offered evidence tending to prove the services of the plaintiff, a witness was introduced who testified that she was a trained nurse and was acquainted with the value of services of nurses, trained and untrained. The counsel for the plaintiff proceeded to interrogate her as to the value of such services as the plaintiff had rendered, but the questions and the witness's answers were objected to, and the action of the Court in sustaining the objections are the second and third exceptions of the plaintiff. When the compensation to be paid for services rendered is not fixed, it is

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proper to receive evidence as to the price usually charged and received for similar services by other persons. The witness had testified she was familiar with what is paid for the services of an untrained nurse. She does not, it is true, locate in terms the place to which her knowledge applies, but she does state that she received her training in Baltimore, where the alleged services were rendered. Under these circumstances we think her evidence was admissible and there was error in rejecting it. *Stanton v. Embrey*, 93 U. S. 548; *Reynolds v. Robertson*, 64 N. Y. 589; 1 *Wharton on Ev.*, sec. 446.

The fourth exception is to the instruction granted upon the conclusion of the plaintiff's evidence to the effect that there was no evidence to establish a contract, express or implied, between the plaintiff and the decedent, and also no evidence legally sufficient to establish the pecuniary value of said services. This instruction raises the question whether there was any evidence from which the jury could legally find there was a contract, express or implied, between the parties. In *Bantz, Extr., v. Bantz*, 52 Md. 693, it was held that, "in order to justify a claim for services being allowed against a decedent, there must have been a design at the time of the rendition to charge, and an expectation on the part of the recipient to pay for the services. These services must have been of such a character, and rendered under such circumstances as to fairly imply an understanding of payment, and a promise to pay. There must have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment." But it was also said in *Bixler v. Sellman et al.*, 77 Md. 496, "the rule as here laid down applies only when a claim of this character is made by a *member of the family of the decedent*, for of course it must be conceded that generally the law implies a promise to pay for services rendered and accepted." As between persons not members of the same family, the "mere fact of rendering services useful to the defendant would furnish *prima facie*

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evidence of their acceptance, and in the absence of some proof to the contrary, would raise an obligation to pay him what they were worth, there being no proof of special value." *Spencer v. Trafford*, 42 Md. 20.

It is abundantly supported by authority, that "if a party voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference." *Day v. Caton*, 119 Mass. 513.

In this case, though the decedent had boarded with the plaintiff for many years, he was not a member of her family, in the sense in which the terms are used in these decisions. There was no relationship either by blood or affinity between them. He was within her house by virtue of a contract, by which he was to pay her \$4.50 a week for board and lodging. Under this contract she was not bound to perform for him the services of a nurse; and if she rendered such services, the mere fact of rendering them raises an obligation upon him and his legal representatives, to pay for them, unless there is proof to the contrary sufficient to rebut the *prima facie* case thus made. Now, there was evidence before the jury that "he was always a sick man, off and on;" that "two years previous to his death he was sick enough to be attended by a physician," and that Mrs. Wallace cared for him and did "for him whatever a nurse would have to do for him." There was also evidence tending to prove that Troemner recognized the services of the plaintiff, and frequently said he would pay her for them. We do not deem it necessary, for the purpose of passing upon this exception, to determine whether any recovery can be had for services rendered by her during the lifetime of her husband. Mr. Wallace died in October, 1890, and there was evidence tending to prove that the plaintiff after that date rendered services as a nurse to the decedent.

We are of opinion, therefore, that the case ought to have been submitted to the jury.

Judgment reversed, and new trial awarded.

(Decided June 19th, 1895.)

THE STATE OF MARYLAND *vs.* HENRY A. FLOTO.

Indictment for Perjury—Appeals in Criminal Cases.

An indictment charging that the traverser, for the purpose of procuring a marriage license falsely, etc., made oath before a Clerk of Court as to certain material facts, is sufficient in law, the Clerk having authority under the statute to administer the oath.

Since the Act of 1892, ch. 506, appeals in criminal cases are upon the same footing as appeals in civil cases, and in neither case can an appeal be taken till after final judgment.

If there is a judgment on demurrer and no exceptions, the case may be brought up for review either by appeal or by petition as upon writ of error. And if in the latter mode, the provisions of Code, Art. 5, sec. 4, must be complied with.

Appeal from a judgment of the Circuit Court for Garrett County (STAKE, J.), sustaining a demurrer to an indictment for perjury. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE and BOYD, JJ.

John Prentiss Poe, Attorney-General, for the appellant.

Thos. J. Peddicord and James C. Peddicord, for the appellee, submitted the case.

FOWLER. J., delivered the opinion of the Court.

The traverser was indicted for perjury in the Circuit Court for Garrett County. He demurred to the indictment, which contained but one count; and the only question, therefore, presented by this appeal is the sufficiency of the indictment.

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We are all of opinion that the demurrer should have been overruled. As was said in *State v. Bixler*, 62 Md. 358, perjury is an *infamous crime*, and therefore, any person convicted thereof will not only be disfranchised (Art. 1 sec. 2, Constitution of Md.), unless pardoned by the Governor, but under the provisions of our Code (Art. 27, sec. 228), will be punished by confinement in the jail or penitentiary for not more than ten years, Art. 27, sec. 228, as amended by Act of 1894, ch. 262. We have thus commented on the gravity and turpitude of this crime because of the circumstances of this case. The traverser, for the purpose of procuring a marriage license for the marriage of his niece and one Ray Young, made application for a license to the Clerk of the Circuit Court for Garrett County, and represented himself to be said Young, and falsely made affidavit to four of the six matters which must be sworn to before the license can be obtained. Section 5, Article 62 of the Code, title, "Marriage," provides that the Clerk of any Court authorized to issue a marriage license, "shall examine on oath the person making application for the same, to ascertain, first, the full names of the parties; second, their places of residence; third, their ages; fourth, their color; fifth, whether married or single; sixth, whether related or not, and if so, in what degree of relationship." And by section 226 of Article 27, "Crimes and Punishments," it is provided that an oath or affirmation, if made wilfully and falsely, and if such affidavit be required by law to be taken, shall be deemed perjury. This indictment charges that the traverser, wishing and intending to procure a marriage license from the Clerk of the Circuit Court for Garrett County, wilfully and falsely made oath and took an affidavit, as required by law, and sets forth that the facts so sworn to were material to be known to said Clerk. The statute makes it the duty of the Clerk to administer the oath and distinctly requires the applicant to take it before he can obtain the license. Under these circumstances it is clear the indictment is good, and the demurrer should have been overruled.

The mode adopted in this case to present the rulings and judgment on the demurer, is, as we have said in *Avirett's case*, 76 Md. 515, entirely in accordance with the provisions of the Act of 1892, ch. 506. Since the passage of this Act, appeals in criminal cases are upon the same footing as appeals in civil cases, and in neither case can an appeal be taken until after final judgment. Formerly it was held, under the Act of 1872, ch. 316, and its amendments (Code Art. 5, section 77), now repealed and re-enacted by the Act of 1892, ch. 506, that the right to appeal in criminal cases was confined exclusively to cases where exceptions were taken in the course of the trial, and that, therefore, rulings upon a demurrer in such cases could not be brought here by *appeal*. But now, under the Act of 1892, when judgment has been entered in a criminal case, the appeal brings up "both the exceptions and demurrer, or the demurrer alone, if there are no exceptions." *Avirett's case, supra*. We also held, in the case just cited, that Rule 1 of this Court, codified as section 4 of Article 5, "remains in force and is applicable whenever the record is removed to this Court by petition, as upon writ of error. In other words, when a petition as upon writ of error is appropriately resorted to, that is where no exceptions are reserved, the provisions of Rule 1 must be observed; but where an appeal is taken under the Act of 1892, the whole record is brought up just as in a civil case." And, therefore, if, as in this case, there is a judgment on demurrer and no exceptions, the rulings and judgment on demurrer may be brought up either by appeal or by petition as of writ of error. If brought up in the latter mode, the provisions of Rule 1 must be complied with, and if by appeal, in the same manner as in civil cases.

Judgment Reversed.

(Decided June 19th, 1895.)

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Syllabus.

THEODORE WESLEY DIZE *vs.* JOHN S. BEACHAM
AND JOHN H. ADAMS & SONS.

Unrecorded Transfer of Vessel—Marshalling of Assets—Notice of Title From Possession—Mechanics' Lien.

A transfer of an interest in a vessel, not registered under sec. 4192 of the Revised Statutes of the U. S., does not convey a title except as against the grantor and persons with actual notice of the same; it is not available against subsequent lien claimants who had no notice thereof.

Where one creditor has a right to resort to two funds for the satisfaction of his debt, and another creditor can resort to but one of them, then, as between creditors, the former will be compelled to exhaust first that fund upon which the single creditor has no claim. This right to enforce a marshalling of the assets is not affected by a conveyance made by the debtor after the liens have attached.

The owner of two vessels executed mortgages on both to secure payment of the same debt, the mortgages being recorded at the home port. Subsequently mechanics' liens for repairs were filed against the second vessel. The mortgagee sold both vessels under a power in the mortgages, and brought the proceeds into Court for distribution. After the lien claims were filed, the owner executed to plaintiff a bill of sale of one-half of the first vessel, and plaintiff also alleged that under a parol, unrecorded agreement, made before the execution of the mortgages, he was one-half owner of the first vessel, and had been in possession as such, and he claimed that the mortgage debt should be paid out of the proceeds of the sale of the second vessel before resorting to the first. The lienors, who had no claim on the first vessel, asked that the mortgage debt be first paid out of the proceeds of that vessel. *Held,*

1st. That since the mortgages covered both vessels while the lien claims affected only the second, the mortgagee was bound, as against the lienors, to exhaust the proceeds of the sale of the first vessel before resorting to the proceeds of the sale of the second.

2nd. That the mere possession of the first vessel by the plaintiff was apparently that of master and not inconsistent with ownership in another, and was not notice to the lienors that he was one-half owner under a parol contract: that inasmuch as the bill of sale to plaintiff was executed after the liens were filed, he could not ask to have the funds marshalled in any way to their prejudice, and that conse-

quently he was not entitled to any part of the proceeds of sale, the same being insufficient to satisfy both the mortgage debt and the lien claims.

Appeal from the Circuit Court No. 2, of Baltimore City (WICKES, J.) The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, PAGE and BOYD, JJ.

Thos. S. Hodson (with whom were *Jacob Myer, Edward S. Kines* and *T. Sherwood Hodson, Jr.*, on the brief), for the appellant.

Thomas S. Baer (with whom was *Robert H. Smith* on the brief), for the appellee.

PAGE, J., delivered the opinion of the Court.

The proof, together with the agreed statement of facts in this case shows, that on the 18th day of June, 1891, John A. Evans, owner of the schooner "Moore & Brady," executed a mortgage thereon to Struven & Wacker, and on the same day the said Evans and one Benjamin F. Evans, executed a similar mortgage on the schooner "Mary A. Kirwan." Both of these mortgages were intended to secure the payment of a note of John A. Evans for the sum of \$1,050.00, and were duly recorded in the Custom House at Crisfield, the home port of both vessels. Benjamin F. Evans owed no portion of this debt, nor was he a party to the note. On the 18th January, 1893, John S. Beacham & Bro. filed their claim for a lien on the "Mary A. Kirwan" for work done and materials provided, to the amount of \$822; and on the 24th day of March, 1894, John H. Adams & Sons filed a similar claim for a lien on the same vessel, to secure the payment of \$245.07. On the 11th day of May, 1894, John A. Evans executed a bill of sale to the appellant for one-half of the "Moore & Brady." Struven & Wacker, under the powers contained in the mort-

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gages, have sold both of the vessels, and the proceedings having been consolidated, the contest now between the parties is as to the distribution of the proceeds. The appellant in his petition alleges, that sometime in July, 1890, he "purchased or agreed to purchase," of John A. Evans, one undivided half part of the Moore & Brady, for the sum of nine hundred dollars, and that in the September or October following, having no bill of sale, entered into possession of the vessel "as master and half-owner;" that he was by virtue of his purchase entitled to receive one-half of the net earnings, and, by agreement with John A. Evans, one hundred dollars for his services as master. That he remained in possession up to the day of the sale made by the mortgagees, and thereby became entitled, for his share of the earnings, to the sum of seven hundred and thirty dollars, which he paid to John A. Evans, and on the 11th May, 1894, demanded and received a bill of sale for his interest. That he did not owe any part of the mortgage debt, and had no knowledge of it until September, 1894, and, therefore, having paid for the one-half of "Moore & Brady," purchased as stated, he claims he is entitled to the order of the Court directing, first, that Struven & Wacker be required to exhaust the proceeds of the "Mary A. Kirwan," in payment of the mortgage debt, before taking any part of the one-half of the "Moore & Brady" belonging to him; and second, that the mortgagees shall abstain, under any circumstances, from appropriating any part of the one-half of the proceeds of the "Moore & Brady" belonging to him.

The doctrine of marshalling assets may be stated as follows: "That when one person has a clear right to resort to two funds, and another person has a right to resort to one only of these two funds, the latter may say that, as between himself and the double creditor, that the double creditor shall be put to exhaust the security upon which the single creditor has no claim," per LORD WESTBURY in *Dolphin v. Aylward*, L. R. 4 H. L. 489. As between the mortgage debt of Struven & Wacker, and the lien claim of Beacham

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& Bro., and that of Adams & Son, if the proceeds of the sale of the "Kirwan" are insufficient to pay all, this rule would require Struven & Wacker to first exhaust the proceeds of the sale of the "Moore & Brady," so that the lienors, who have a claim on the "Kirwan" alone, could have payment out of the proceeds of the sale of that vessel. Nor could this right be affected by a conveyance made after these liens were filed. The language of this Court in *Hamilton v. Schwehr*, 34 Md. 119, a case not unlike this in respect to the point we are now considering, is directly applicable. It was there said: "These liens, at the time they attached, carried with them as incidents the right of the parties respectively to such equities as would render them available and productive. Of these was the equitable right of the holders of the machines' lien to have marshalled the fund arising from these lots, if it was necessary to pay both their debt, and that secured by the first mortgage. This equity existed before the second mortgage to Hamilton was made, and cannot be affected or destroyed by the conveyance to him." Applying these principles in this case, if the right of the appellant to the relief he prays for could be rested only upon the existence of his bill of sale, which was executed after the liens of Beacham & Bro., and of Adams & Sons respectively attached, it is clear he could set up no claim to have these funds marshalled in any way that would enure to their prejudice.

It is contended, however, by the appellant, that under the parol contract with Evans, followed by his possession of the vessel, he had a title before these lien claims attached. If this be so, and the lienors had notice of the claim of the appellant, or by reason of his possession are chargeable with such notice, the case would present a different aspect; for, in applying the rules for marshalling funds, the maxim, *qui prior est in tempore potior est in jure* has peculiar force. *Robeson's Appeal*, 117 Pa. St. 628; *Hastings case*, 10 Watts, 305; *N. Y. L. Ins. Co. v. Vanderbilt*, 12 Abbot's Prac. 460; 2 *Beach Mod. Eq. Jur.*, sec. 785.

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But whatever may be the character of the right of the appellant to the vessel under his parol contract with Evans, it still can confer no right to priority as against these lienors unless the latter had notice of it, either express or implied. For if they have expended work and material on the "Kirwan" when they were ignorant in fact and not chargeable with knowledge of a secret equity between the appellant and Evans by which their right to marshalling as against Struven & Wacker would be rendered unavailing to them, it would be against every principle of equity to allow the appellant to come in now and deprive them of that right. Now, assuming for the present that the appellant did purchase and thereby acquire title to the "Moore & Brady" in July, 1890, can we find from the proof in the cause that Beacham & Bro. or Adams & Sons either had actual notice or must be charged with notice thereof? It is not pretended they had actual notice, but it is insisted that it is inferrible from the fact that the appellant was in possession of the vessel. Did the mere possession, such as the proof shows, charge them with notice? It is doubtless true that in respect to movable property of a kind such as is usually transmitted by mere delivery, possession and actual custody of the property, may and does furnish notice of absolute ownership. *Wade on Notice*, sec. 306. But when the property is of a kind usually protected by title papers and the actual visible possession is not inconsistent with the ownership of another who has the record title, the rule ought to be like the one applicable to cases where the party is in the occupancy of land. *Wade on Notice*, sec. 67. In such cases the possession which is sufficient to put a person on inquiry, and which will be equivalent to actual notice of rights and equities in persons other than those who have a title upon record, must be actual, open, visible, not equivocal, occasional or for a special purpose, and inconsistent with the title of the apparent owner by the record. *Brown v. Volkening*, 64 N. Y. 82; *Spraeghts v. Hawley*, 39 N. Y. 448; 2 *Devlin on Deeds*, sec. 769.

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The petition states that Dize entered into the possession "as master and half owner." He himself testifies that he went as "master," and that Evans received the net earnings and gave him receipts as representing his share of the net earnings. Evans says, Dize "was to sail her." * * * "I agreed to give him twenty dollars per month, but that included the taking care of her." We think it clear that Dize sailed the boat as master, though he received in addition to his pay as such a share of the earnings with which to buy one-half of it, which was to be his only "when paid for." His possession was to strangers apparently that of a master only and was not inconsistent with ownership in another. The mere fact that he sailed the vessel as her master was not *per se* sufficient to put others upon inquiry and thus charge them with notice of the appellant's claim. It is also insisted that by the parol contract with Evans, Dize acquired a good title even as against persons dealing with the vessel without notice, though he leaves it uncertain when it accrued. According to the proof, "he was to have a right to her," "when she was paid for," and if we take the testimony of Evans this was not done until the spring of 1894. The exact time when the payment was completed does not appear, but possibly it was about the time the bill of sale was demanded and received, that is, on the eleventh of May; and if this be so, his title even under the parol agreement did not accrue until after the lien of Beacham & Bro., attached in January, 1893, and of Adams & Sons, which was filed in March, 1893. Assuming, however, that as between himself and Evans, Dize obtained his title at the time of the making of the contract, that is, in 1890; yet that, in the absence of notice actual or implied on the part of the lienors, could not avail to give Dize a precedence over them. It cannot be questioned that a vessel may be bought and sold as other personal property. "Between the vendor and vendee, neither a bill of sale nor a change of registry is necessary to complete the transfer."

Chadbourne v. Duncan, 36 Me. 89.

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The cases cited by the appellant's counsel to sustain his contention, that by a parol contract, accompanied with delivery, a good title would pass, even as against *bona fide* purchasers without notice, do not support that view. In *Scudder v. The Calais Steamboat Co.*, 1 Clifford, 370, (finally decided in 2 Black. U. S. Rep. 373), the questions raised turned upon the rights of an equitable owner, where the agent having the legal title, improperly sold the vessel to a *bona fide* purchaser without notice. In the case of *The Amelie*, 6 Wallace, 18, the Court held the Registry Laws of the United States had no application, the vessel not being treated as an American ship; and in *Lynch v. The Seminole*, 43 Fed. Rep. 168, neither of the bills of sale were recorded. In *Crapo v. Kelly*, 16 Wall. 610, and *Taylor v. Carryl*, 20 Howard, U. S. 583, the doctrines applicable to purchasers or lienors, without notice, were not involved. On the other hand, the Act of Congress of 1850, being sec. 4192 of the Revised Statutes of the U. S., provides, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor, mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, &c., is recorded in the office of the Collector of Customs where such vessel is enrolled." This section, whenever it has come before the Courts, has always been construed to mean that no transfer not recorded will be available to convey title, except as against the grantor and his representatives and persons with notice. *Moore v. Simonds*, 100 U. S. 146; *Guiding Star*, 18 Fed. Rep. 269; *The Madrid*, 40 Fed. Rep. 682.

In no aspect of the case can we determine that the equity of Dize to ask for marshalling in his favor, is superior to that of Beacham Bro., and of Adams & Sons, and we must therefore affirm the decree of the lower Court.

Decree affirmed.

(Decided June 19th, 1895.)

J. HENRY JUDIK ET AL. *vs.* JOSEPH CRANE.

Surrender of Lease by Mortgagor—Ratification of New Lease by Acts of the Parties—Mistake in Boundaries—Specific Performance—Marketable Title.

Where leasehold property is mortgaged, a surrender of the lease and the acceptance of a new lease in its place by the mortgagor alone, has no effect as against the mortgagee and those claiming under him at a mortgage sale.

But such new lease may become valid by the ratification and acknowledgement thereof by the purchaser at the mortgage sale, and the reversioner.

The lessee of certain property, mistaking the lines of his lot as described in the lease, made his improvements partly on land not within his boundaries, but belonging to the lessor. The lessee mortgaged the leasehold interest, describing the same as in the lease. Subsequently the lessee surrendered the lease to the lessor and received a new lease, describing correctly the lot actually occupied by him. The mortgage was foreclosed and the lot conveyed to the purchaser by the description in the *first* lease and the mortgage. The rent or reversion, as described in the *second* lease, was conveyed to the plaintiff. The assignees of the leasehold paid rent to the reversioner, and all parties recognized their respective ownership of the lot actually occupied. *Held,*

1st. That the surrender of the old lease and the acceptance of the new one by the mortgagor—lessee, although not *per se* binding as against the mortgagee, was beneficial to all parties subsequently interested, and had been ratified and confirmed by their subsequent acts.

2nd. That the title of the reversioner to the lot actually occupied by the assignee of the lease was good, and specific performance would be decreed of a contract to buy the rent.

Appeal from a decree of the Circuit Court of Baltimore City (WRIGHT, J.), sustaining a demurrer to the bill of complaint in this case and dismissing the same. The bill prayed for a decree enforcing the performance of a contract by the defendant to buy an original irredeemable ground rent of \$140 *per annum* issuing out of lot No. 418 Forrest street,

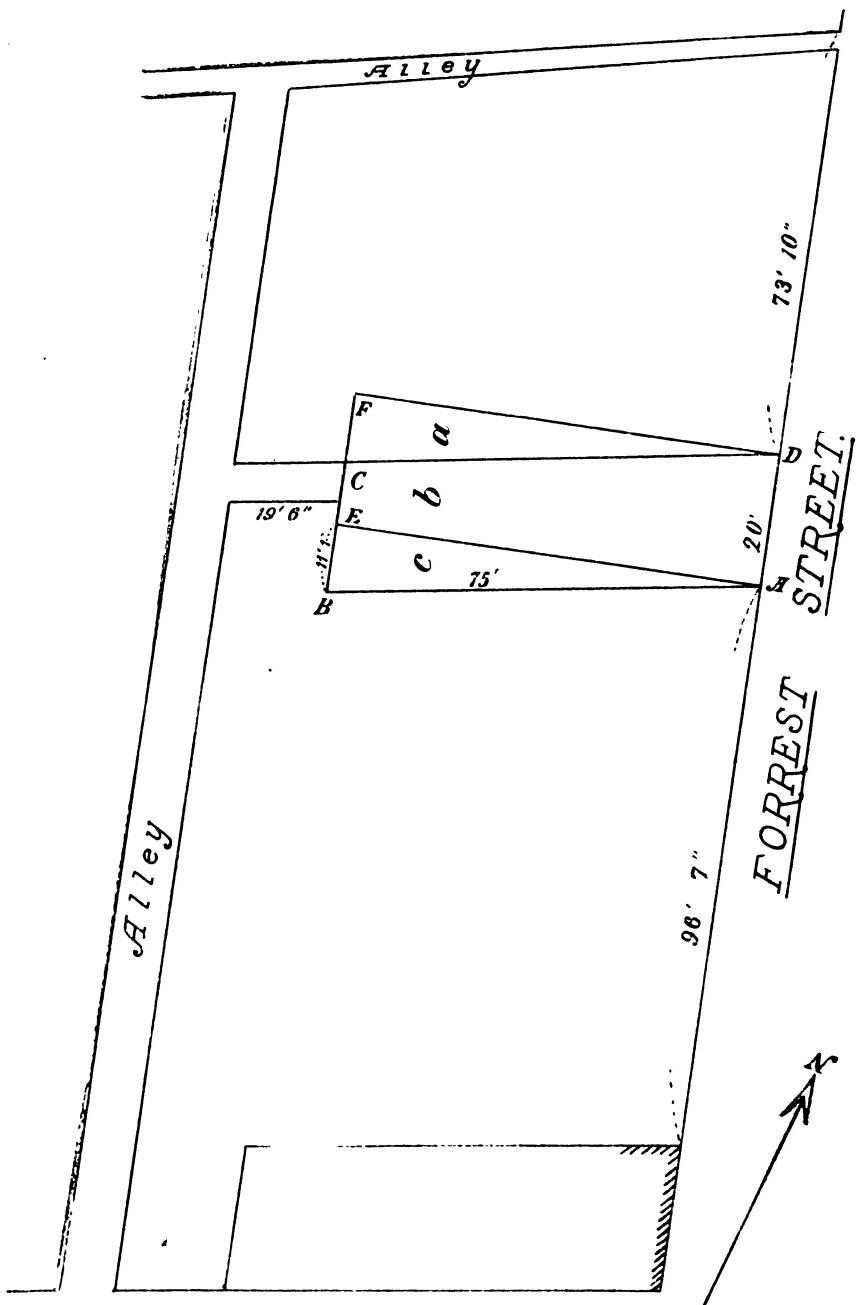
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in said city. The plaintiff's bill and exhibits showed that on August 24, 1871, a lease for ninety-nine years, with usual covenants and conditions, was executed by E. L. Rogers to J. M. Brock, reserving the annual rent of \$240 out of a lot of ground on the southwest side of Forrest street, in the city of Baltimore, which is distinguished on the plat within the letters D, A, E, F (or lots A and B.) The lessee thereunder, Brock, not properly following or understanding the metes and bounds described by said lease, entered upon the lands and built his house [as distinguished on the plat by letters D, A, B, C (or lots B and C), and shaded.] The lessee, Brock, also, after building, executed a mortgage of his leasehold interest, following the lines of, however, his then recorded title, D, A, E, F (or lots A and B.)

After the erection of his improvements and the execution of the mortgage, it was discovered that a mistake had been made by Brock in building outside of the lines of the original lease, and for the purpose of correcting the mistake, etc., on the 24th of July, 1872, Brock executed a deed of surrender by metes and bounds [D, A, E, F (or lots A and B) on plat], to his original lessor (Rogers), and on the same day Rogers, being then the owner of the fee in lot D, A, B, C (or lots B and C), on plat, leased it for a renewable term of ninety-nine years, with the usual covenants and conditions, to Brock, for the annual rent of \$240, declaring in said lease that it was "intended to lease the land on which the house and improvements of the said Brock now stand, as the same are included within the description D, A, B, C" (or lot B and C.)

At the time of surrender and new lease, no attention was paid to the rights of the mortgagee of Brock, whose record claim was then against the lot on plat distinguished by D, A, E, F (or lots A and B.)



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By a series of conveyances, *on May 17th, 1894*, the fee-simple title in the property and the reversion of \$240 reserved by the lease from Rogers to Brock became vested in the appellant in this case—lot D, A, B, C (lots B and C) on plat—and on August 15th, 1894, the leasehold interest became vested in Lester E. Overton in lot D, A, E, F (or lots A and B) on plat. *Overton entered into possession* of the land on which the house and improvements built by Brock stood—lot D, A, B, C (or lots B and C) on plat—but received record-title of the old lot—D, A, E, F (or lots A and B)—because the mortgagee of Brock foreclosed his mortgage, and the subsequent owners under said foreclosure proceedings had to take the record title originally in the mortgagee. On October 24, 1894, Judik, the owner of the reversion, and Overton, the owner of the leasehold, executed a deed by which the rent was reduced to \$140 per annum.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE and BOYD, JJ.

Harry M. Benzinger and Charles J. Bouchet (with whom was *James S. Calwell* on the brief), for the appellants.

The owner of the leasehold is estopped by deed from refusing to pay the annual rent issuing out of the lot D, A, B, C (or lots B and C), and, being in possession, is compelled by law to pay the annual rent issuing out of the lot D, A, B, C, (or lots B and C). With reference to the triangle D, C, F, lot A, on plat; which was part of the original leasehold created by the lease of 24th August, 1871, that being the property of Lester E. Overton (*by record-title, though not his title nor the title of any of his assignors, back to Rogers by possession*) at the time when he executed the deed and agreement with the plaintiff, and fixed the lines D, A, B, C (or lot B and C) as the true ones, he had the right to eliminate it, as he then did, out of this discussion. All reasonable objections of the appellee being now con-

sidered with reference to the leasehold title, it is suggested by him that the reversion in an yearly rent of \$140 is not an original and irredeemable ground rent. This objection cannot prevail. It is the original, irredeemable ground rent of two hundred and forty dollars reserved by the leases, reduced by proper and legal methods to a shape which now only permits its collection to the amount of \$140 per annum, and at that amount it was purchased by the appellee. No essential feature of it is changed. It is a rent service, as declared by this Court in *Ehrman v. Mayer*, 57 Md. 621, 622, carries with it, as an essential incident of a rent service, the right to distrain, and *can be apportioned, and even a part of it extinguished*, without affecting the balance of the rent. See also *Worthington v. Cook*, 52 Md. 297; *Pressman v. Silljacks*, 58 Md. 328.

When Brock erected his improvements along the erroneous lines, he supposed that he was liable under the lease of August, 1871, and when it was discovered that there was an error, the title to the fee in lot C being then admittedly in Rogers, both lessor and lessee endeavored to, as far as possible, correct the mistake. And even if the deed of surrender amounted to nothing, it is clear that Brock, by the execution and recording of the paper of August, 1872 (whether it be considered a lease or a simple declaration), corrected the title to lots B and C for the benefit of both himself and those claiming under him, and specially charged those lots with the payment of the rent of \$240 reserved by the lease of 1871.

This recorded estoppel relieves the case entirely of any character of claim which could be advanced by Brock or his assignees in lot C, and resolves this case into two considerations: 1st. As to whether the original rent of \$240 can be partially extinguished, as was done by the recorded agreement extinguishing \$100 of the original rent. 2nd. As to whether (Brock and his assignees being estopped, as above contended) the present leaseholder, being in possession of lots B and C, is not bound by the decision in *Ehr-*

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man v. Mayer, supra, and is under obligation to abide by all the covenants of the original lease as running with the land, particularly the covenant for the payment of the annual rent therein reserved. If these contentions of the plaintiff are correct, then it is submitted that he is entitled to a decree for specific performance as against the defendant Crane. *Rieman v. Wagner*, 74 Md. 479; *Blight's Lessee, v. Rochester*, 7 Wheaton, 547; *McLennan v. Grant*, 36 Pacific Rep. 682; *Purinton et al. v. Northern Ills. R. R. Co.*, 46 Ill. 297; *Bulkley v. Devine*, 127 Ill. 406; 11 Howard 322; *Kelso v. Steiger*, 75 Md. 402; *Campbell v. Shipley*, 41 Md. 82.

Richard Bernard for the appellee.

While it is conceded that the first lease did not create a good ground rent issuing out of the property sold to Crane, it is very plain that the leasehold title to lots A and B, created by the first lease, was never surrendered. The legal title to this leasehold estate was, at the time of the surrender, vested in Brock's mortgagee, which was no party to that surrender. When Brock's equity of redemption was foreclosed, that was the end of the title surrendered. As the surrender was inoperative and left the first lease in full force, the title thereby created vested in the purchaser at the mortgagee's sale. It follows, therefore, that the second lease to Brock—so far as it affected lot B—was entirely inoperative. This second lease operated to vest in Brock a leasehold title to lot C; that title remains undisturbed to this day. And we submit that the plaintiff cannot convey to the defendant a good and marketable title to "an old, original and irredeemable ground rent of \$140" issuing out of lots B and C, because no such ground rent exists. If it does exist, how was it created?—Not by the first lease to Brock—that was a lease of lots A and B. And there is no such ground rent for sale. Not by the second lease; that lease, as far as it affected lot B, was entirely nullified by the foreclosure proceedings. It is conceded that Overton never

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had any paper title to lot C before the execution of the agreement between him and Judik ; then the leasehold title to that lot was still outstanding in Brock, entirely unaffected by anything that is shown to have transpired, Brock being no party to the agreement. But the appellants claim to hold against Brock by adverse possession. A landlord cannot hold adversely to his tenant without repudiating the lease, so that if that contention is correct, then that is the end of the second lease, and all rights thereunder.

Apart from the objection that the leasehold title to lot C is still vested in Brock, there is but one possible way that a reversion and ground rent by paper title can arise out of lots B and C, and that is to treat the deed and agreement, Exhibit No. 7, as a new lease. This paper was dated in October, 1894, after Crane agreed to buy the property. If its effect is to create a renewable lease for over fifteen years, then the rent issuing therefrom cannot be an irredeemable rent. Act of 1888, chapter 395, Code, Article 21, section 85 ; *Stewart v. Gorter*, 70 Md. 242. We concede that it is an extreme proposition that a mere abatement of a portion of an irredeemable rent since the passage of the Act of 1888, renders the remainder of the rent redeemable. But there is nothing extreme in the proposition that parties cannot, since the Act of 1888, by agreement, create a leasehold title and an irredeemable ground rent issuing out of a lot of ground from which no such rent, or a rent for a larger sum, issued before.

BRYAN, J., delivered the opinion of the Court.

The appellant and his wife filed a bill in equity against the appellee for the specific performance of a contract for the sale of certain real estate in the city of Baltimore. On demurrer the Court dismissed the bill with costs.

The property was sold by auction to the appellee for the appellant, and was described as "an old and original irredeemable and well-secured ground rent of one hundred and forty dollars per annum on No. 418 Forrest street, near

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Gay street." We will state the particulars of the title. Edmund Law Rogers and wife, in August, eighteen hundred and seventy-one, leased to John M. Brock for ninety-nine years, renewable forever, a lot of ground on Forrest street, at the yearly rent of two hundred and forty dollars. The lot was quadrangular and the second and fourth lines were perpendicular to Forrest street. But Brock made a mistake in running his lines and made the second and fourth oblique in a direction parallel to Low street, which crossed Forrest at a short distance southwesterly; and he entered upon, enclosed and improved the lot thus bounded. The diagram attached to this opinion shows the two lots; the one described in the lease is marked at the corners by the letters D, A, E, F, and the one actually occupied is marked D, A, B, C. It will be seen that while the front of each lot is the same, the one which was occupied by Brock takes in on one side a small triangle not included in the lease, and leaves out on the other side another small triangle which was included in the lease. Brock mortgaged his leasehold, describing it according to the boundaries in the lease. After the execution of the mortgage, Brock, in July, eighteen hundred and seventy-two, executed a surrender of his lease to the reversioners, and received from them, on the same day, a new lease in the same terms as the former one, except that it described by correct metes and bounds the lot actually occupied by him. The leasehold was sold under and by virtue of the mortgage, and was conveyed to the purchaser by the description in the first lease. In May, eighteen hundred and ninety-four, the reversioners conveyed to David S. Collet the rent and reversion as reserved by the second lease, and he conveyed them to J. Henry Judik. Since the auction sale of the ground rent, Judik and wife have released for value a portion of the rent, amounting to one hundred dollars per annum, so that the amount now payable is one hundred and forty dollars per annum.

When Brock executed the surrender of his lease, he was not possessed of the legal title to the leasehold. That was

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vested in the mortgagee, who was liable as assignee on the covenants of the lease. *Hintze v. Thomas*, 7 Maryland, 346, as explained in *Mayhew v. Hardesty*, 8 Maryland, 494. Brock held only the equity of redemption, which was afterwards barred by a sale under the mortgage. Upon the facts which we have stated (and they are those alleged in the bill of complaint), Brock's surrender of his lease and acceptance of another one in its place could have no effect against the mortgagee, or any tenant holding under title derived from him. Consequently the second lease and the reservation of rent contained in it would be inoperative to bind the successive assignees of the original leasehold. The Court therefore properly sustained the demurrer. But there are other facts very strongly implied, although not stated in the bill. From the known and ordinary course of business, we think it highly probable, in fact almost certain, that the assignees of the original leasehold who can claim title only under the mortgage sale, have entered upon and taken possession of the lot enclosed and improved by Brock, and have paid to the reversioner the rent reserved. If so, he has recognized them as tenants, and they have acknowledged him as their landlord. From this mutual recognition and acknowledgement very important consequences follow. In the first place, a party consenting to hold as tenant cannot afterwards deny the title of him who is acknowledged as landlord. This was said by this Court in a case where the tenant had originally entered upon land under another title, and subsequently to taking possession had consented to hold as lessee, and agreed to pay rent; *Isaac and Wife's Lessee v. Clarke*, 2 Gill, 1; an action of ejectment where it was necessary to prove a clear legal title. Another result takes place. Brock's surrender of the old lease, and acceptance of the new one were beneficial to him, because it secured him in the possession of the lot which he had improved; these transactions were also beneficial to the reversioner, because it gave him the security afforded by the whole of the improved lot. The benefit to Brock's suc-

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cessors in the possession would be as great as the benefit to him. Now, although his dealings with the leasehold could not bind the mortgagee against his will, yet he could have authorized it beforehand, and he could have ratified it after it was done. And when his assignee (the purchaser at the mortgage sale) took possession, he also had the right to ratify and approve the advantageous arrangement made between Brock and the reversioner. And he could not ratify it in a more positive and unequivocal manner than by taking and enjoying the benefits conferred by it. If he took possession of the improved lot and paid the rent on it, he sanctioned the substitution of it for the other and adopted the adjustment made by Brock and the reversioner. On the other hand, the consent of the reversioner would be fully manifested by the acceptance of the rent. We would then have as decisive and irrevocable a ratification as could be made of a proceeding which originally was affected with infirmity. No element would be wanting to give it efficacy. There was notice of the surrender of the new lease, which was given by the public land records; and the deliberate acceptance of the benefits conferred by these instruments, followed by the payment and receiving of a money consideration in the form of rent. It is not necessary to refer to the effect of continuous acquiescence for more than twenty years, because the ratification had absolute validity as soon as it was consummated, and it needed no support from lapse of time. A case was decided by this Court some years ago which illustrates in some respects the views which we have expressed. In *Cook v. Creswell*, 44 Maryland, 581, a woman was tenant of certain land, and her husband, acting as her agent, surrendered the term and accepted a new one. The wife recognized the agency of her husband and adopted and acted upon the change made in the tenancy. It was held that she was estopped from insisting that she had never surrendered the original term. The question was presented in its simplest form, and the justice of the decision is unquestionable. An attentive examina-

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tion of the case will, however, show that an important principle was involved. The third section of the Statute of Frauds enacts that no lease shall be surrendered unless by deed or note in writing, signed by the party so surrendering or by his agent thereunto lawfully authorized by writing. As the husband had no written authority, his surrender must have been invalid, and great injustice would have been done, except for the operative of the principle which we have been considering. From such examples, we may see the wisdom and necessity of this maxim of the law, and its salutary influence in the conservation of justice.

The title is perfectly good if the facts are as we suppose them to be, and the complainants ought to be allowed to allege them by amending their bill. To enable them to do so we shall remand the cause by the authority of section 36 of Article 5 of the Code, without either affirming or reversing the decree below.

*Cause remanded without affirming
or reversing the decree.*

(Decided June 19th, 1895.)

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Syllabus.

JOHN J. SHANFELTER *vs.* JAMES R. HORNER,
TRUSTEE.

Forfeiture of Lease for Non-Payment of Rent—Ejectment—Demand of Rent—Evidence—Right of Trustee to Maintain Ejectment.

A lease provided that if the rent reserved should at any time during the tenancy be for more than ninety days due and in arrear, "then the said tenancy shall be at once, and without notice of any kind, determined, and the party of the first part become and be entitled to immediate possession of the premises aforesaid, provided he shall so elect, but not otherwise." *Held*, that upon such default in the payment of the rent, the landlord was entitled to maintain an action of ejectment for the premises without having previously made a demand of payment.

In such action the tenant cannot be asked why he did not pay the rent when due.

The estate of the landlord in said premises and lease was conveyed to the plaintiff in trust for the city of Baltimore. *Held*, that the plaintiff was authorized to maintain the action.

Appeal from the Court of Common Pleas of Baltimore City (DENNIS, J.) The case is stated in the opinion of the Court.

The cause was argued before BRYAN, McSHERRY, FOWLER, ROBERTS, PAGE and BOYD, JJ.

Richard S. Culbreth, for the appellant.

As there was no demand for the rent, there was no breach of the covenant to pay it. By demand in such cases is meant a demand made with all the technical niceties of the common law. *Henderson v. Coal and Coke Co.*, 140 U. S. 25; *Mackubin v. Whitcraft*, 4 H. & McH. 154; *Jackson v. Harrison*, 17 Johns, 66; *McQuesten v. Morgan*, 34 N. H. 400; *Jones v. Reed*, 15 N. H. 68; *Smith v. Whitbeck et al.*, 13 Ohio St. 472; *Tate v. Crowson*, 6 Ire. 67; *Bowman v.*

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Foot, 29 Conn. 331; *Chapman et al. v. Kirby*, 49 Ill. 211; *Bacon v. Furniture Co.*, 53 Ind. 230; *Chapman v. Harvey*, 100 Mass. 353; *Acock v. Phillips*, 5 H. & N. 183; *Smith's Leading Cases*, 1 vol. 1 pt. 132-134; *Gear on Landlord and Tenant*, sec. 195; *Taylor's Landlord and Tenant*, sec. 493.

As the right to re-enter is still necessary before advantage can be taken by ejectment of the forfeiture of a lease, it will be found in most of the cases cited that the leases provide not only for the forfeiture by the use of such language as that "they shall be null and void," or "shall cease and determine," but also for the right of re-entry in express terms. But in some of the cases the clause of re-entry is omitted. And it was argued in the Court below, on behalf of the appellee, that if a lease for years declares expressly that it shall terminate upon breach of a condition subsequent, and contains no clause of re-entry, it will then end *ipso facto*; but if it contains a clause of re-entry, it is only voidable by re-entry. The rule is so stated in *Gear on Landlord and Tenant*, section 71. The following cases are cited to support the text: *Parmelee v. R. R. Co.*, 6 N. Y. 74; *Kenner v. American Contract Co.*, 9 Bush. 207; *Kenrick v. Smick*, 7 Watts & S. 41; *Sheaffer v. Sheaffer*, 37 Pa. St. 525.

The first two cases are not in point, for the conditions were not for the payment of rent; and it is only in the case of such conditions that the necessity for a demand on the land exists. *Smith's Leading Cases*, 8th ed. 1 vol. 1 pt. 133; *Sheppard's Touchstone*, 136; *Co. Litt.*, 210 a.; *McQuesten v. Morgan*, *supra*. And the two Pennsylvania cases were reversed in *Gas Co. v. DeWitt*, 130 Pa. St. 212.

In the case of *Jewett v. Berry*, 20 N. H. 36, it does not appear that there was any clause of re-entry, the condition being that "if the yearly rent should not be paid within sixty days after the same should have fallen due, the lease shall be void." The Court said: "The mere omission to pay the rent does not work a forfeiture of the term, unless the rent be demanded on the day it is due, and on the prem-

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ises out of which it issues." So, in the case of *Chapman v. Wright*, 20 Ill. 120, there was a clause of forfeiture, but no clause of re-entry. The Court said: "The doctrine seems to be well settled, that, in cases of forfeiture of a lease for non-payment of rent, there must be a demand."

In the law of landlord and tenant, the words demand and notice are rarely, if ever, used in the same sense. The phrase, without notice of any kind, means simply that after a forfeiture of the estate has occurred in consequence of a breach of the condition, the lessor is entitled to the immediate possession of the premises without first notifying the lessee of his intention to claim it. As the estate was to cease and determine, provided the lessor should so elect, but not otherwise, what was the character of the tenancy after breach of the condition, but before the election of the lessor was declared! Was the lessee a tenant at sufferance? If so, he was entitled to 30 days' notice to quit under the Code. Now it was for the purpose of avoiding the necessity of giving such notice or any notice, that the words "without notice of any kind" were employed. They were not intended to relate to anything that might transpire before the breach, but only after it. Their object was to define or emphasize the right of the lessor to immediate possession of the premises, without the necessity of giving the lessee even a day's notice to vacate them. By "without notice" was meant "without notice to quit," which is the ordinary sense in which the word is used.

William S. Bryan, Jr., City Solicitor, (with whom was *Thomas G. Hayes, City Counsellor*, on the brief), for the appellee.

First Bill of Exception.—The prayer offered by the appellant at the close of the appellee's case, was as follows: "The defendant prays the Court to instruct the jury that under the proceedings and evidence in this case, there is no legally sufficient evidence to entitle the plaintiff to recover." It will be more convenient to consider the questions sought

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to be raised by this prayer when discussing the granted prayers, and it is sufficient to say now that the prayer was properly rejected because it was subject to the vice of being too general. *2 Poe on Pract.* sec. 297; *Hatton v. McClish*, 6 Md. 407; *Dorscy v. Harris*, 22 Md. 85; *Reier v. Straus*, 54 Md. 291.

Second Bill of Exception.—This exception is to refusal of the Court to allow the appellant to give his reasons why he did not pay the rent which he had permitted to become over five months in arrears. How the private reason which he might have pretended to have had for not fulfilling his contract and paying his rent, could affect the enquiry before the Court, or could in any way be relevant, was not stated by the learned counsel in the Court below. The ruling was too clearly right, it is submitted, to permit of serious discussion. The forfeiture *vel non* of the lease depended upon his act, not upon his motives.

Third Bill of Exception.—The defendant's prayer was as follows: "The defendant prays the Court to instruct the jury that the plaintiff is not entitled to recover unless they find that the plaintiff demanded payment of the precise sum due on the most notorious part of the demised premises at a convenient time before sunset on the day it was due, and that of these facts there is no evidence." In other words, that to forfeit the lease the defendant had to observe all the obsolete and technical common-law requirements in regard to a re-entry.

The rule of law, it is submitted, on the subject of forfeitures by conditions subsequent, is well settled. It is stated as follows, in *Gear on Landlord and Tenant*, section 71: "Conditions subsequent are those by the forfeiture or non-performance of which an estate already vested may be defeated. * * * If a lease for an estate for years declares expressly that it shall terminate upon a breach of a condition subsequent, and contains no clause of re-entry, it will then end *ipso facto*; but, if it contains a clause of re-entry, it is only voidable by re-entry." The law is clearly laid

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down to the same effect in *Parmlee v. R. R.*, 6 New York, 74; *Kenreck v. Smich*, 7 Watts & Sargeant, 41. The reason for the distinction between the cases where there is, and the cases where there is not, in addition to the condition that on the non-payment of rent the lease shall be void, the additional proviso that the landlord shall have the right to re-enter, is plain. The whole question is one of the construction of the instrument, and the intention of the parties. And applying the familiar canon of construction that, if possible, some meaning must be given to every clause in the lease, the argument seems irresistible that if any force at all is to be given to the clause securing the right to the landlord to re-enter, it must be to make the whole paper mean that the lease shall be void if the landlord elect to re-enter. *Armsby v. Woodward*, 6 B. & C. 519; *Kerner v. Am. Contract Co.*, 9 Bush. 207.

The condition in the lease in the case at bar is that if for more than ninety days the rent shall be "due and in arrear, then the said tenancy shall be *at once and and without notice of any kind determined*, and the party of the first part become and *be entitled to immediate possession* of the premises aforesaid, provided he shall so elect, but not otherwise." Nothing is said about re-entry.

It is submitted that this question is settled in this State by the decision of *Cooke v. Brice*, 20 Md. 397.

ROBERTS, J., delivered the opinion of the Court.

This is an action of ejectment brought by the Comptroller of Baltimore, as trustee for the city, against the defendant, the tenant in possession of the Imperial Hotel property in said city. Issues were joined on the plea of not guilty, and the verdict and judgment being for the plaintiff, the defendant has appealed. The facts are, that the defendant and one Charles C. Duffy, as partners, leased from Charles J. Bonaparte the premises in question, on the 28th of March, 1892, for a term of five years, beginning May 1st, 1892, at a rental of \$800 per month (which was subsequently in-

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creased), payable on the first day of each calendar month during said term. Shortly thereafter Duffy died, and on June 5th, 1893, his personal representatives and the defendant made another agreement with Bonaparte, by which the interest of Duffy's estate in said lease was transferred to the defendant. By the terms of this agreement the defendant was accepted by Bonaparte as "sole tenant and debtor," and the estate of Duffy was released from all liability on account of said lease. There can be no question on the evidence, which the record presents, that the defendant not only recognized and treated Bonaparte as his landlord, but after said Bonaparte, by his deed of date September 1st, 1893, conveyed said property to the appellee, the appellant treated the appellee as his landlord and fully recognized him as such. Looking to the terms of the original agreement of lease between Bonaparte and Duffy and the defendant, we find this provision, that, "if the rent hereby stipulated to be paid shall, at any time during the continuance of any tenancy created, or to arise in pursuance of this agreement of lease, be for more than ninety days due and in arrear, then the said tenancy shall be at once, and without notice of any kind, determined, and the party of the first part become and be entitled to immediate possession of the premises aforesaid, provided he shall so elect, but not otherwise." It is not pretended that the plaintiff did not elect.

Referring to the deed from Bonaparte to the defendant, we find that said property is conveyed, "with the right of the said James R. Horner, trustee, to enforce all the covenants and provisions of said lease, as fully and in the same manner as said Bonaparte could enforce the same, in the event of any future default upon the part of the said Shanfelter or any one claiming under him;" and further, that said property is conveyed "in trust, that said Horner shall hold said property hereby intended to be conveyed, and collect all the rents, income and revenues to be derived therefrom, when the same shall mature and accrue, for the sole and separate use of the Mayor and City Council of Baltimore, &c."

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The record contains three exceptions. The first and third relate to the prayers, and the second to the evidence. At the close of the plaintiff's case, the defendant offered a prayer, by which he sought to take the case from the consideration of the jury. This prayer will be considered in connection with the prayers offered at the conclusion of the case. The second exception is taken to the refusal of the Court to allow the appellant to state why he did not pay any rent for the leased property after the first of December, 1893. We have not been referred to any authority which tends to sustain the relevancy or materiality of this question. It does not belong to that class of questions, to determine the relevancy of which it is necessary that it should have been answered. But under the issues in this case, the question of itself and by itself was properly disallowed. As said by the appellant's attorney in his brief, "The forfeiture *vel non* of the lease depended upon his *act*, not upon his *motives*." It is admitted that no rent was paid after the date named, and if we correctly understand the statement of the counsel for the appellant, in this Court, it is not contended that the appellant had any valid excuse for not paying the rent due by him. But in any event, we think no just reason has been assigned why the rent was not paid.

We find no error in the proposition of law submitted by the appellant for the instruction of the jury, and granted by the Court, which, together with the prayer of the appellees refused by the Court, constitute the third bill of exceptions. This prayer of the appellant presents the chief contention in this appeal. It is as follows: "The defendant prays the Court to instruct the jury that the plaintiff is not entitled to recover, unless they find that the plaintiff demanded payment of the precise sum due on the most notorious part of the demised premises at a convenient time before sunset on the day it was due, and that of these facts there is no evidence." If this prayer correctly states the rule of law which ought to obtain in this State in the forfeiture of a lease for the non-payment of rent, it is quite clear that it has not been followed

in this case. But we think the appellant has misconceived the true meaning and legal effect of the condition contained in his agreement of lease with Bonaparte. It will be seen, by reference to its terms, that a re-entry was not requisite to have entitled the lessor to determine the tenancy, for it is expressly provided thereon, that if the rent shall be for more than ninety days due and in arrear, the tenancy shall be at once, and without notice of any kind, determined. We do not agree with the appellant that this condition must be held subject to the common law requirements set out in the prayer now under consideration. To do so, would be to ignore the whole tendency of modern legislation as illustrated in the enactments of the various States of the Union, and especially in our own State, in the Act of 1872, ch. 436. LORD TENTERDEN, speaking as to the construction proper to be placed upon conditions of this character in *Doe & Davis v. Elsam*, 1 M. & M. 189, said: "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisoes ought to be construed according to fair and obvious construction, without favor to either side." There never was any just reason for giving to the condition contained in an agreement for a lease an interpretation totally at variance with the canons of construction usually applied in the ascertainment of the true meaning of contracts made in the ordinary affairs of life, and we are unwilling to sanction it now. Sedgwick & Wait in their work on the *Trials of Title to Land*, § 367, say: That in all cases where an estate for years is granted on condition, and the lease declares that the estate shall cease and determine on the breach of the condition, without any clause of re-entry or other qualifications, the estate will *ipso facto* cease as soon as the condition is broken. *Parmelee v. O. & S. R. R. Co.*, 6 N. Y.

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74; see *Morten v. Weir*, 70 N. Y. 247. Mr. Washburn, in his work on *Real Property*, vol. 1, p. 505, speaking of the effect of a condition subsequent, says: "Again, it is held that a condition can only be taken advantage of, if broken, by the lessor, or his assigns * * * and if the estate of the tenant be one for life, the reversioner can only defeat it by entry. But, if it be for years, no entry is necessary, unless it is stipulated in the lease that the lessor shall re-enter, and in this case he may, after breach, bring ejectment without first making a formal entry." *Roberts v. Davey*, 4 B. & Ad. 664; *Hughes v. Palmer*, 19 C. B. 405; *Shattuck v. Lovejoy*, 8 Gray, 204; *Gamhart v. Finney*, 40 Mo. 449; *Doe v. Birch*, 1 M. & W. 402; and, again, the same author, on p. 513, further says: "Sometimes the parties agree that upon the non-payment of the rent the lessor may enter for breach of the condition without previous demand, and in such case a previous demand is unnecessary." *Doe v. Masters*, 2 B. & C. 490; *Assoc. v. Howland*, 5 Cush. 214; 2 *Platt Leases*, 338; *Byrane v. Rogers*, 8 Minn. 281; *Sweeny v. Garratt*, 2 Disney, 601. To like effect is Gear on *Landlord and Tenant*, § 71, who says: "Conditions subsequent are those by the forfeiture or non-performance of which an estate already vested may be defeated. * * * If a lease for an estate for years declares expressly that it shall terminate upon a breach of a condition subsequent, and contains no clause of re-entry, it will then end *ipso facto*; but, if it contains a clause of re-entry, it is only voidable by re-entry." *Parmelee v. R. R.*, *supra*. In a note to 1 *Broome & Hadley's Commentaries*, 604, it is stated that "In the case of a condition to determine a freehold estate, entry or claim is requisite; but in case of a condition of a lease for years, declaring that it shall be void in a certain event, the reversioner may treat the terms as having absolutely determined when the event happens, without any entry."

Coming now to the case of *Cooke v. Brice*, 20 Md. 397, we think it strongly supports the case of the appellee.

The condition in that case was, "That in case the rent reserved shall be in arrears and unpaid for the space of six months the lease shall be void." In this case the condition is more explicit and direct, and leaves nothing to inference, and, if we adopt LORD TENTERDEN's excellent rule of construction, we will experience no difficulty in saying that the Court below committed no error in rejecting the appellant's prayer.

There yet remains for our consideration the question as to the plaintiff's right to maintain the action in the manner in which it has been brought. It is contended that the character of a party, whether acting indirectly or in a representative capacity, must appear. If in the progress of the case in the Court below it had appeared that the plaintiff had no interest therein authorizing him to maintain the action, it would have been then and there an easy matter to have availed of his lack of authority to sue. But instead of seeking to take action on the question, the defendant allowed the plaintiff to prove without objection by the very terms of the deed from Bonaparte to the plaintiff that he held the property in trust for the Mayor and City Council of Baltimore, &c. We think it clearly appears from the evidence that the appellee, as trustee, held such an interest in the property as authorized him to maintain this action. Finding no error in the rulings of the Court below, we affirm its judgment.

Judgment affirmed with costs.

(Decided June 20th, 1895.)

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Syllabus.

JAMES J. GRAY vs. THE FARMERS' NATIONAL
BANK OF ANNAPOLIS.

Liability of Surety on Note—Delay in Proceeding Against Principal Debtor—Authority of Cashier of Bank—Renewal Notes.

A bank cashier has no authority by virtue of his office to accept a new note for an existing indebtedness to the bank so as to discharge a surety on the first note, or to make a contract so to do.

A creditor does not lose his right to enforce the liability of a surety by mere delay to proceed against the principal debtor or to enforce a sale of property held as security for the debt.

Plaintiff was a surety on a note given to the defendant bank by A. The note was secured by a deed of trust of the property of A., the principal debtor, and was renewed from time to time, the plaintiff signing the renewal notes until 1885, when he informed A. that he would no longer sign a renewal. The bank was notified of plaintiff's refusal, and, after the maturity of the last note signed by plaintiff, a renewal note was presented to the bank without plaintiff's name. This was declined and returned to A., and plaintiff informed thereof. Subsequently the bank agreed to renew the note without plaintiff, provided other security was obtained in his place, with the assent of the co-sureties, and interest and discount paid; but no renewal note was in fact accepted. A. expected to renew the note, and deposited with the bank to his individual credit funds to meet the discount and interest. In 1886 the cashier, the note being overdue for nearly a year, made an entry on the books by which these funds were placed to the credit side of the bank's account as interest on the note. An action was brought on the last note signed by plaintiff and judgment obtained against him. Afterwards he filed a bill to restrain execution, alleging that he was ignorant at the time of the action of the facts concerning the renewal of the note. *Held,*

1st. That the bank did not in fact agree to release plaintiff except upon conditions that had not been complied with, and that plaintiff remained liable upon the last note signed by him.

2nd. That the bank had a right to apply the funds of A. deposited with it to the payment of the note *pro tanto*, and that the entry on the books by the cashier did not import the making of a contract for the renewal of the note without the plaintiff's name.

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3rd. That if the entry on the books of the bank were to be construed as payment of interest on the note in advance, and an agreement to extend the time so as to discharge the surety, then the cashier had no authority to make such contract or entry, and his action in the premises had not been ratified by the directors.

Appeal from a decree of the Circuit Court for Anne Arundel County, in Equity (ROBERTS, C. J.), dismissing the appellant's bill of complaint. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, PAGE and BOYD, JJ.

George R. Gaither, Jr., and *Harry M. Clabaugh*, for the appellant.

James M. Munroe, for the appellee.

PAGE, J., delivered the opinion of the Court.

In May, 1875, Dr. Benjamin R. Davidson applied through Judge Hagner to the Farmers' National Bank for a loan of nine thousand dollars. In April, of the same year, the Judge wrote to Dr. Davidson as follows: "I mentioned your matter at the board to-day, and I think it can be adjusted in this way: You all have a note there now for \$3,800. The new note will include this, and will pay it off. It will be signed by Mr. J. Wilson Iglehart, as I understand, and some other surety, omitting Talbot. Then you will all execute a deed of trust to secure the payment of the entire indebtedness. This deed of trust can be made to sureties, or to some one else of your own selection;" and on the 28th of April, "the board has agreed to your proposition, except as to the length of time." In pursuance of this agreement, Dr. Davidson and George Davidson executed and delivered to the bank their note for the sum mentioned, payable six months after its date, with Jane Davidson, William G. Mackall, Sr., and John W. Iglehart as sureties; and to secure the bank and the said sureties from all loss by reason

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thereof, also executed a deed of trust to Judge Hagner, covering certain lands situate in Anne Arundel County. Judge Hagner prepared these papers, and it is insisted by the appellant that in so doing he was acting as the attorney for the bank. The appellee denies this and affirms that though the Judge was at the time a member of the board of directors, he was not its attorney, but was in fact employed by the Davidsons. In the views we shall express, we do not regard this question as at all material. The note thus given was from time to time renewed, and on the nineteenth of December, 1884, Messrs. Iglehart & Mackall having died, Mr. Brashears and the complainant were accepted as sureties in their place. On the fourteenth of July, 1887, the note being then overdue, the bank brought suit and obtained judgment on the seventh day of October, 1887, against all the parties, including the complainant, for \$9,264.45 and costs. On the eighth of March, 1893, the complainant filed his bill, in which he prayed that this judgment should be declared void as to him, and an injunction issued restraining the bank from taking any steps against him to collect the same. In addition to the above facts, the bill alleges that the complainant signed the renewal note at the request of the Davidsons; that the circumstances connected with the making of the loan, and "the fact that the bank held said deed of trust upon the property as primary security," were stated to him and "fully understood by him as a condition" for his so doing; that in the early part of 1885 he informed the Davidsons he would "no longer place his name on the renewal notes," and that other arrangements must be made; that thereupon the said Davidsons presented to the said bank a renewal note for said loan without the name of the complainant, and he is informed the bank accepted the same, and received from them a discount for an extension of six months. That when suit was brought on the note in 1887, he was falsely informed by the cashier that the renewal note had not been accepted, and in consequence made no defence, whereupon

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judgment was rendered against him. The bill further alleges that he urged upon the officers of the bank in frequent interviews, "the necessity for an immediate sale" of the property covered by the deed of trust, and the president agreed in the winter of 1889 that it should be sold in the following June, but despite this and other urgent requests on the part of the appellant, it remained unsold until December of 1891. That in meantime it had greatly depreciated in value, and taxes and interest had accumulated to such an extent that it failed by a large sum to bring enough to pay the claim of the bank. The defendant, in its answer, denies these charges, and in substance avers that the note upon which the suit of 1887 was instituted was the last ever accepted for the renewal of the original note for the Davidsons' loan, or upon which discount was paid; that no note was ever accepted without the name of the complainant; that until that suit was brought, no steps had been taken to enforce collection by law, and that when the appellant requested it to sell the property covered by the deed of trust, it was suggested to him to "pay off the note and take such steps as he deemed necessary." That by reason of the prospect of the speedy completion of the Drum Point Railroad, which then seemed reasonable, it was probable the lands would greatly enhance in value, and it would therefore be to the advantage of all parties to wait until the road was running; and that the delay in advertising the property was due to that cause, the illness of Mr. Revell, and the necessity that arose for legal proceedings to bring in other parties.

The first question that arises, therefore, is, does the proof sustain the statement in the complainant's bill, that in January, 1886, the Davidsons presented to the bank a renewal note for another period of six months, without the name of the complainant, and, if so, did the bank accept it and receive the discount?

It appears from the proof that Mr. Gray notified Dr. Davidson that he would not be able to go on his note

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again, by letter dated the 6th of March, 1885. The note then outstanding with Mr. Gray's name on it as one of the sureties, became due on the 22nd June. The directors were made aware of Mr. Gray's refusal, on the 12th August, 1885. On that day, a note for renewal, without Mr. Gray's name, was presented, declined by the board, and returned by Mr. Randall to Dr. Davidson. Both the Doctor and Mr. Gray were notified by letters, bearing date the 12th August, 1885, of this action of the board, and Mr. Gray was also notified that "unless the note can be renewed with your name or some other, considered equally good, the whole business will have to be closed up, by suit, against all the makers on the note, which we hold overdue, yourself among the rest." To Dr. Davidson, the president, after stating what had been done by the board, concludes his letter of the 12th August as follows: "I have informed Mr. Gray that the whole business will have to be closed up by suit against him and all the others, &c. * * Mr. Gray, no doubt, has just cause of complaint, for there has been very little, if any, reduction of the note for years, but he does not avoid responsibility by refusing to sign a renewal note, for he is on the one which we hold. I return the note" (that is, the renewal note), "and his letter; please see him at once, and have the matter put in shape." Dr. Davidson also sent to the bank, on June 25th, two hundred and fifty-one dollars and eighty-seven cents, whereupon the cashier addressed him a note stating he "inclosed a blank for your note due 22nd inst. I credit you \$251.87; this will leave a balance still due on discount of \$11.40." This balance was probably paid to the bank on July 28th, so that when the directors met on the 12th August, while the money for the discount was to the credit of Davidson with the bank, yet Mr. Randall distinctly states that it was to the credit of the Doctor upon "the individual ledger;" that is, as he explains, to his individual credit, and, like any other deposit, subject to check. Mr. Randall explains the course of business, in such cases, as

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follows: "When a note has been running for more than one or two renewals, all sums deposited for discount or interest, by the person in whose name the note stands, or is carried on our books, is carried to the individual credit of that person on the individual ledger of the bank, like any other deposit made by him, and if the board of directors agree to renew the note when it is presented to them for renewal, the amount of the old note is charged to the individual and the proceeds of the new note is credited to the individual." The proof is conclusive that the action of the board on the 12th August was to positively decline renewing the note without Mr. Gray's name. After this, the matter seems to have rested until late in the year. On the 31st December, the president, in reply to a letter of the 29th, urges Dr. Davidson to take some action towards renewing the notes. He says, "it is absolutely necessary;" "they can't be allowed to remain over longer;" "the bank has certainly shown its anxiety not to distress you, and if you can give us two names as good as Gray's, as you say you can, and pay the back interest and discounts on the renewals, matters can go on for awhile, and you can have a chance to bring in your crops, &c." "I enclose you notes for renewal, and a mem. of back int. due and amt. of discount for renewals." Not receiving a reply to this, on 13th January Mr. Randall writes again: "I have heard nothing from you in regard to a renewal of the notes to this bank and substitution of two names in lieu of that of James Gray's, as proposed by you." He then refers to a letter from R. W. Templeman, asking, in the event of his loaning Davidson \$8,500, if the bank would postpone its lien in his favor, and concludes: "The board has taken up the whole matter afresh, and in view of your efforts to improve matters and better prospects of avoiding a sale, which seemed inevitable, they now agree to renew your notes without Gray's name, and to let matters rest; you, of course, paying all interest and discounts now due * * * I sent you notes ready for renewal, &c., and I want you to come up this week, without fail, and see

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me and fix matters." To understand this letter properly, we must refer to the action of the board of directors. It appears from the letter of 31st December, cited above, that the president had written to Davidson in regard to a renewal of the notes and the substitution of two names in place of Gray's, and had sent him the notes "ready for renewal." As hinted at in the letter last cited, in which Mr. Randall used the words "in view of your efforts to improve matters and better prospects of avoiding a sale," it was then thought that Davidson would be able to effect a loan from other parties, and thus be enabled to make a payment to the bank, in which event the directors were willing that Mr. Gray should be released, provided the other sureties would assent. Mr. Randall in his testimony so states, and Dr. Davidson admits that it was understood at the time he received this letter, that the release of Mr. Gray was qualified by the necessity of securing other security in his place; and among the proceedings of the board of the 13th January, appears the proposition of Dr. Davidson and the action of the board, as follows: "Proposition to renew his note in full without James J. Gray's name, all parties to note to agree in writing that the notes shall be renewed without Gray's name. Agreed to." What the meaning of this letter was, however, is not very important, for it is clear that no renewal was in fact accepted. The proceedings of the bank show that the subject was frequently before the board, and its repeated refusal to renew without the name of Mr. Gray. The correspondence makes it clear that the action of the bank was always a refusal to do so, except with the assent of the other sureties. On the sixth day of October, 1886, Mr. Randall, in writing to Dr. Davidson, said: "The board has assented to the renewal of the note without Mr. Gray's name, provided the assent of the parties to the note, particularly that of Mr. Brashears, was first obtained in writing. Yesterday Mr. Brashears was at the bank and informed us that he would not agree to renew the note unless Gray signed with him. To-day the board declined to re-

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lease Gray and Brashears; and consequently you will have to take up the loan." Davidson himself does not say there was a renewal; in his testimony, he says, that in June, 1885, "the note was offered without Mr. Gray's name and discount paid;" but in reply to the 37th and 38th cross-interrogatory, as well as in his letter of 3rd Sept., 1887, he explains that by stating that it was because he had sent in the note, and paid to the bank money for the discount; that he supposed that was the equivalent of accepting the new note, and thereby Mr. Gray was released. Mr. Randall, in his testimony, states most explicitly, that no renewal note was accepted after the 19th December, 1884; and in this, we think, he is corroborated by the overwhelming weight of all the evidence in the cause. It may be added, that it seems that Mr. Gray knew nothing of these transactions until September, 1887, when the summons was served on him to appear in the suit instituted by the bank. Thereupon he communicated with Dr. Davidson and received his reply bearing date the 3rd September. He has no information touching the alleged renewal, and does not testify upon the subject. By an amendment to his bill the complainant charges that the note was renewed without his name during the month of January, 1886. We are of opinion, however, that there was no actual renewal at any time, and the complainant is still bound as surety, unless he has been released, as will be hereinafter considered.

2nd. But it is contended that even if it be conceded that a new note was not accepted by the bank, in lieu of the note of the nineteenth of December, 1894, yet that Mr. Gray was discharged by the fact that the bank received the discount or interest in advance on the old note, after having been notified of Mr. Gray's refusal to have the note further extended. It was insisted that the letter of Mr. Randall, of 13th January, 1886, contains an express agreement to that extension. But we have shown that the expressions in that letter must be construed in the light of the existing circumstances, and meant only that the bank would release Mr.

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Gray, provided the assent of his co-sureties could be obtained. It would seem, however, that Davidson expected to be able to renew the note, and for the purpose of having the funds ready to meet the discount, had at divers times deposited with the bank various sums, until on March 19, 1886, there was to his credit \$485.10. These, as they were received, were placed to the credit of his individual account, according to the usual course of business as already explained. On that day, the note then being overdue (since the preceding June), the cashier made the following entry: "1886, Mar. 19th—Int. on note, \$8,584.76; 11 months, 6 days int., \$485.10," and placed the same upon the credit side of the bank's account with Dr. Davidson. This seems to have been done by him upon his own responsibility. Mr. Green, an officer of the bank, upon being asked by what authority it was made, replied, "that was made with the cashier. I suppose it was done just about dividend time; that note was almost due over a year, and I suppose he credited it up, and had that money due to his credit on his personal account." This sum was not received by the bank as discount, but merely, as we have seen, as a deposit of Davidson, and subject to his check, but to be applied as discount when a renewal note was accepted; and as it already has appeared, no such renewal note was accepted. The old note on the 19th March was still outstanding, and was long overdue. It was under these circumstances, within the right of the bank to apply it to the credit of the note, so as to operate as a payment *pro tanto* of what was due upon it. *Farmers' and Merchants' Bank v. Franklin Bank*, 31 Md. 412—and even if it be conceded that the cashier was invested with the power, *virtute officii*, to make such entries as would effect this result, yet it cannot be pretended that if in so doing he employed such terms as to import a new contract, by which an existing contract is abrogated, and a surety is discharged, the board of directors would be bound by such entry, unless the particular act was authorized, by the general

usage of the bank, or by special authority conferred upon the cashier, or confirmed by the acquiescence of the board made with a full knowledge of the facts. There is not the slightest proof in the cause of any special authority having been conferred upon the cashier to make the entry, in the form in which it appears. The by-laws are not in the record, but the learned Judge who decided the cause below has said in his opinion that these "do not authorize or justify any officer to accept notes and discount the same, in the summary method suggested ;" and Mr. Randall, the president, and Mr. Green, both testify that by the usage and rules of the bank, no officer has anything to do with the renewal of a note "that lies with the directors." It is well settled, that in *virtute officii*, a cashier has no power to discharge a surety. *Savings Bk. v. Sailor*, 63 Mo. 24; *Merchants' Bk. v. Rudolf*, 5 Neb. 527; *Bank v. Haskell*, 51 N. H. 116.

In the case of the *Chemical Nat. Bk. v. Kohner*, 8 Daly (N. Y.) 530, the law was stated as follows: "A cashier is the business officer of the bank, but only in the sense of one who transacts, and not one who regulates or controls its affairs. His duty has reference to daily routine business, and not to matters involving discretionary authority, which belongs, unless delegated, to the board of directors ; as has been quaintly said, "they are the minds and he is the hands of the corporation * * *. It will not be disputed that when a special authority is conferred upon him, or when he acts in conformity with a general usage, or an established acquiescence of his board of directors, the bank will be responsible for such acts, though beyond the ordinary scope of his duties." *The United States v. The City Bk. of Columbus*, 21 How. (U. S.) 356. To the same effect was the ruling of this Court in *Ecker, Ectr., v. First Nat. Bk. of New Windsor*, 59 Md. 303. There JUDGE MILLER, speaking for the Court, said: "In our opinion, a cashier, as such, has no power to accept a note signed by two parties only, in payment and discharge of a note upon which another party was also bound, with the two, so as to release such third

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party from his indebtedness to the bank ; such an act does not fall within the well-known range of powers and duties naturally and necessarily pertaining to the office of cashier. He cannot *virtute officii* release a surety upon a note, &c.

* * * But notwithstanding the cashier has no power thus to bind the corporation * * * still it was competent for the directors to ratify his act, when it was communicated to them, and if they approved it, or with full knowledge acquiesced therein, the bank will be bound as effectually as if previous authority had been expressly delegated by them." There is no proof establishing the approval or acquiescence of the directors in the act of the cashier, so far as respects the particular form of the entry, or that it was in fact ever communicated to them. It is certain, however, that they acted all the time upon the hypothesis that nothing had been done or agreed upon to release Mr. Gray without the assent of his co-sureties. It is hardly presumable they would have continued to discuss the question of a renewal without his name, as late as the sixth of October, 1886, if they had acquiesced in the act of the cashier made in the March preceding, whereby Mr. Gray had been already released. Nor can their acquiescence be inferred from the retention of the money, for this they had the right to do, as we have seen. It is the particular application made by the cashier that is important, and not the retention. In the cases cited by the appellant, as in *The Peoples' Bk., &c., v. Man. Nat. Bk.*, 101 U. S. 181, the bank obtained the money through the very transaction that it afterwards sought to repudiate. Here the bank received the money rightfully, and seeks only to repudiate the unwarranted act of the cashier, in so crediting it on its books, as to bind them to the making of a new contract, by which a surety will be discharged. On July 14th, 1886, and again on 6th October, 1886, they held meetings, and on both occasions declined to renew without Gray's name, and prior to either of these dates had taken the same action. In view of these facts, it seems difficult to understand how it can

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appear that by a mere technicality, resulting from an unauthorized act of the cashier, the bank can be held to have entered into a valid contract for a renewal, so as to disable itself from suing upon the original note. Its repeated action in declining to renew, can be considered in no other light than a positive repudiation of the particular application of the fund made by the cashier. The extension of time in cases like this "is a question of mutual understanding and intention, and like other contracts, the agreement of the parties may be derived from and inferred by acts, declarations, facts and circumstances." *Brooks v. Wright*, 13 Allen (Mass.) 76; *Myers v. Wells and Magee*, 5 Hill, 463.

Nor do we find in the letter of the president of the bank of the sixth of October, 1886, an implied confirmation of the cashier's application. By the usage of the bank and by the by-laws, as stated in the opinion of the Judge below, no officer was authorized to bind the directors to such a contract. Moreover, that letter was written seven months after the entry was made, and in the same letter he informs him that "to-day the board declined to release Gray, &c." For these reasons we cannot hold that the note in question has been renewed without Mr. Gray's name, or that he is released by the effect of the entry so made by the cashier, or by the dealings of the bank with the fund standing to the credit of Dr. Davidson at the time that entry was made.

3rd. Another point raised by the bill and answer was, that the bank having agreed in June, 1889, with Mr. Gray, to foreclose the mortgage deed of trust, allowed two and a half years to elapse before the sale, and, in the meantime, by reason of the accumulation of taxes and interest, and of the depreciation of the property, the proceeds of sale proved insufficient to pay the debt. Of this, we may dispose in a few words. It seems that Mr. Gray, in 1889, offered to pay \$2,500, provided he should be released, and if this was not accepted, insisted upon a sale. The board rejected the proposition to release him on these terms, but

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decided to advertize the property, and so notified Mr. Gray by letter. There is much evidence in the record tending to prove the cause of the delay that ensued; but we deem it unnecessary to advert to it, except to say that it does not appear that the bank ever took possession of, or assumed any control over the property. Stating the proof in its strongest aspect against the bank, its action amounted to no more than inaction or passive delay, and when that is the case, there is no impairment of the creditor's right to resort to the surety. *McShane v. Rodgers*, 73 Md. 155; *King v. Baldwin*, 2 Johnson's Chan. 555.

If the surety desires to expedite payment, he may pay the debt, and by that means put himself in the place of the creditor, or he may call on the creditor, by the aid of a Court of Equity, to proceed against the debtor upon giving the proper indemnity against costs and delay. *Freaner v. Yingling*, 37 Md. 497; *King v. Baldwin, supra*.

There were other questions discussed at the hearing and in the briefs of counsel, but we do not refer to them, inasmuch as it follows from what we have said that the decree appealed from must be affirmed.

Decree affirmed.

(Decided June 19th, 1895.)

CHARLES J. MOORE *vs.* ELEANOR TAYLOR,
MARGARET ANN JENIFER ET AL.

Oral Appointment of Agent by Husband and Wife—Memorandum Required by 4th Section of Statute of Frauds—Sales at Public Auction—Purchaser from Heirs of Decedent upon whose Estate no Administration was Granted—Assignment for Benefit of Creditors—Death of Party Pending Appeal.

The heirs to whom an estate descended agreed in writing that, in order to avoid a partition suit, the property should be sold by a certain auctioneer. One of the heirs, a married woman, became the purchaser through an agent appointed orally by her and her husband. The auctioneer made a memorandum of the sale at the time. *Held*, that the purchase was binding on the married woman.

When the memorandum of a contract under the fourth section of the Statute of Frauds is signed by an agent, it is not necessary that he should have been appointed in writing.

When land is sold at public auction, the auctioneer is the agent of both buyer and seller to sign the memorandum required by the statute ; and the same is complete when he makes an entry of the purchaser's name and the terms of the sale.

Where a party executes a deed conveying all his property to a trustee for the benefit of creditors, and the trustee subsequently under an order of Court reconveys the property to the grantor, the effect of the deed of trust is entirely nullified ; and the mere fact that a creditor of the grantor filed a claim in the cause after the passage of the order and before the actual reconveyance, does not suspend its operation. A subsequent purchaser from the grantor acquires a good title.

W. conveyed his interest in certain land to his brothers in trust to pay the income to himself for life, and upon his death, in default of testamentary appointment, to distribute "the principal sum thereof" to his brothers and sisters. Upon his death no letters of administration were taken out. *Held*, that a *bona fide* purchaser of the land from said grantees seven years after the date of the deed, would have a complete defence to the claims of possible creditors of W.

Under the law as it stood at the time of the death of a married woman seized of property, her husband was entitled to act as her administrator without taking out letters. *Held*, that a *bona fide* purchaser of land from her heirs, twenty years after her death, would take a title free from the claims of any creditors of the married woman who might subsequently appear.

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Where one of the parties to an appeal dies after the cause has been argued and submitted, the judgment of the Court of Appeals has the same effect, under Code, Art. 5, sec. 75, as if the party were alive.

Appeal from a decree of the Circuit Court for Baltimore County, directing the sale of certain land for the purpose of partition. The case is stated in the opinion of the Court.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, BRISCOE, PAGE, ROBERTS and BOYD, JJ.

George G. Hooper, for the appellant.

D. G. McIntosh, for the appellees.

BRYAN, J., delivered the opinion of the Court.

A bill in equity was filed by Eleanor Taylor, widow, and Thomas R. Jenifer and his wife, against Charles J. Moore and his wife, Robert Moore and Charles J. Moore, trustees, and Carl Vietor. Robert Moore was dead at the time the bill was filed. The object of the bill was to obtain a decree for the sale of certain real estate for the purpose of partition among the heirs of Ann Moore, deceased, who was the mother of Mrs. Taylor and Mrs. Jenifer and of Charles J. Moore. A decree for sale was passed by the Court, and Charles J. Moore appealed.

We will state the facts as they appear to us from the pleadings and proofs. Mrs. Ann Moore died in eighteen hundred and seventy-three, seized and possessed in fee-simple of certain real estate in Baltimore County. She left surviving her Robert, her husband, and two daughters, Mrs. Taylor and Mrs. Jenifer, and two sons, William H. and Charles J. On the second day of April, eighteen hundred and eighty-eight, William conveyed all of his property, real and personal, to Robert, his father, and Charles, his brother, in trust, to pay the whole income of the property to himself during his natural life, and upon his death to hold all of the property upon such trusts as he should appoint by his last will and testament, and in default of such

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appointment to distribute the "principal sum thereof" to his two sisters and his brother, share and share alike. William died intestate, without issue and unmarried, on the fifth day of the same month. Robert, the husband of Mrs. Ann Moore, died in the year eighteen hundred and ninety-one. On the second day of May, eighteen hundred and ninety-three, Mrs. Taylor, Mrs. Jenifer and her husband, Charles Moore and his wife, executed an instrument of writing under their respective hands and seals, whereby it was agreed that for the purpose of avoiding the expense and costs of a partition suit, the real estate in question should be sold in Towson, at the Court-house door, on certain prescribed terms, and after a specified notice, and that the sale should be made by William M. Risteau, as auctioneer. The sale was made at the appointed time after due notice, as required, and John Longnecker became the purchaser, as agent for Mrs. Jenifer and Mrs. Taylor, being appointed by them, with the sanction of Mr. Jenifer, the husband. The auctioneer made at the time a written memorandum of the sale.

The written agreement, which the heirs made for a sale by auction, was valid and competent. A question is made as to the binding effect of the purchase upon Mrs. Jenifer, she being a married woman. The fourth section of the Statute of Frauds enacts that contracts for the sale of land shall be in writing, and "signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." A marked difference is to be noted between the language thus used, and that of the first section, in which it is required that certain estates in land shall be made or created by writing "signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing." The text-books and decided cases have directed particular attention to this difference between the two sections and to its necessary consequences. *Browne on the Statute of Frauds* states the result of the cases to be that the agent for signing may in all the cases enumerated

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in the fourth section be appointed without writing, unless the memorandum to be signed is to be sealed also; in which case the power must be conferred by an instrument of equal dignity. Section 370 *a*. And when at a public sale land is knocked down to the highest bidder by the auctioneer, it is conclusively settled that he becomes the agent of both buyer and seller, and that the memorandum required by the Statute of Frauds is complete when he makes in his book an entry of the purchaser's name and the terms of sale. *Singstack v. Harding*, 4 Harris & Johnson, 186; *Ijams v. Hoffman*, 1 Md. 423; *Browne on Statute of Frauds*, section 351. Longnecker was the agent of Mrs. Jenifer and Mrs. Taylor to bid for this land, appointed with the sanction of Mrs. Jenifer's husband; he bid it off for them, and the memorandum in writing was duly made by the auctioneer. Nothing more is required to make the contract of sale binding under the Statute of Frauds.

It is, however, argued that the title to the land was not good. It appears that in September, eighteen hundred and ninety-one, John Moore and Charles J. Moore, being partners in business, conveyed all their property to Carl Vietor, in trust, for the benefit of their creditors; and that on the tenth of September, eighteen hundred and ninety-two, the Circuit Court of Baltimore City passed an order discharging the trustee and directing him to reconvey the trust property to the grantors free from the trusts created by the deed to him. After the passage of this order in November, eighteen hundred and ninety-two, Hilton and Sibbey filed a claim in the cause; on the thirty-first of July, eighteen hundred and ninety-three, Hilton and Sibbey dismissed their claims, and on the same day the Court passed an order confirming the previous order of reconveyance, which had been passed in September, eighteen hundred and ninety-two. On the first day of August, eighteen hundred and ninety-three, Carl Vietor reconveyed the trust property to John and Charles Moore, and on the seventh day of the same month the deed was recorded in Baltimore County.

The operation and effect of the deed of trust were entirely nullified by the Court's order of September, eighteen hundred and ninety-two; this order could not be suspended or affected by the filing of a claim by Hilton and Sibbey, nor by anything less than the Court's own action. But the confirmation of the order and the recording of the deed from the trustee are certainly sufficient to set at rest every question under this head. The recording of the deed invested Charles Moore with the legal title to his property, but the whole beneficial interest was already held by him under the Court's order of September, eighteen hundred and ninety-two.

It is also said that as no letters of administration have been granted on the estate of William Moore, that any creditors which he may have had at the time of his death will have a lien on the portion of the land which was conveyed by his deed to Robert and Charles Moore. It must be noticed that there is no proof whatever that William Moore was indebted to anybody at the time of his death. It is merely a surmise that such might be the case. But supposing that he were indebted, this deed conveying his property has been recorded among the land records of the county for nearly seven years, and no claim has been made by anyone alleging himself to be a creditor. Under these circumstances any *bona fide* purchaser of the land from William Moore's grantees without notice of any indebtedness would have a most complete and meritorious defence against any creditor. The case is stronger in reference to any supposed indebtedness by Mrs. Ann Moore. She died in April, eighteen hundred and seventy-three. According to the law then existing, her surviving husband was entitled to act as her administrator without taking out letters. *Code of 1860*, Article 93, section 32; *Willis v. Jones*, 42 Md. 422; *Mobray v. Leckie*, 42 Md. 474. Subsequent legislation has made a change in the law in this respect. Acts of 1878, chapter 268; 1882, chapter 477. If Mrs. Moore had any creditors, their resort in the first instance was against her

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husband, who occupied a position similar to that of administrator. During all this long interval no creditors have appeared. If they should now appear, they could establish no claim against a *bona fide* purchaser from her heirs, without notice of their claims.

Our conclusion is that the title to the land in question is good, and that Mrs. Jenifer and Mrs. Taylor are bound by their purchase at the auction sale, and that they are responsible for the amount at which it was sold to them. Consequently the proceedings for sale for the purpose of partition cannot be maintained and the decree must be reversed and the bill dismissed.

*Decree reversed and bill dismissed
with costs in both Courts.*

(Decided June 19th, 1895.)

A motion for re-argument was subsequently made, and in disposing of the same,

BRYAN, J., delivered the opinion of the Court.

A motion for a re-argument has been filed on the ground that one of the appellees has died since the hearing, and before the decision.

The question is settled by Article 5, section 75, of the Code. It is there enacted: "When a case is under rule-argument in the Court of Appeals, and a party shall die having an attorney in Court, the Court of Appeals shall give judgment to have the same effect as if the party were alive, &c., &c." The section is a codification of the Act of 1806, chapter 90, section 11. Under the present Constitution all causes stand for argument at the first term after the transmission of the record, and therefore the necessity for a rule-

argument no longer exists. In point of fact, such rules are never laid. In the present case the death occurred not only after it stood for argument, but after the argument had been heard and the cause submitted to the Court for decision.

The motion must be overruled.

Motion overruled.

(Decided December 13th, 1895.)

GEORGE T. MELVIN AND HENRY S. MANCHA *vs.*
J. WEST ALDRIDGE ET AL.

Objection to the Jurisdiction—Accounting between Principal and Agent—Commissions of Real Estate Agents on Sales of Property Payable in Instalments—Interest.

A bill in equity was filed for an injunction, the rescission of a contract, and a discovery and account of money received by the defendants, as agents of the plaintiffs, to sell certain lands. The defendants, while denying the material allegations of the bill in their answer, professed their readiness to account. The bill was dismissed as to all the relief asked for except an accounting. No special exception was filed to the jurisdiction of equity to decree payment of the sum due, but the same was made in the argument below. *Held*, that this objection to the jurisdiction could not be availed of on appeal.

The contract in this case provided that the defendants, as agents of the owners of a tract of land, should lay out, develop and sell the same in lots and be entitled to certain commissions on sales. Some of the lots were sold under contracts by which the purchase money was made payable in instalments. *Held*,

- 1st. That the agents are not entitled to the full commission on the entire price of a lot out of the first instalment collected by them, but are entitled only to commissions on the instalments as paid from time to time.
- 2nd. That when purchasers renounced their contracts and forfeited instalments already paid, the agents are not entitled to the whole of such instalments.

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3rd. That the agents are liable for interest on all amounts collected by them and not paid over promptly to their principals, less their commissions.

4th. That the agents are not entitled to credit for money loaned by them to one of the owners, that being a transaction in which his co-owners were not concerned.

The contract in the above case also provided that, until a certain mortgage incumbrance on the land should be paid, the money arising from the sale of lots should be applied by the owners to the payment of the mortgage. *Held*, that the agents had no authority to collect such purchase money.

Appeal from a decree of the Circuit Court for Anne Arundel County, by which the defendants' exceptions to the accounts stated by the plaintiffs were overruled, and it was ordered that defendants should pay to the plaintiffs the sum of \$1,673.27. The plaintiffs, J. West Aldridge *et al.*, being the owners of a tract of land near Annapolis, made an agreement in September, 1889, with the defendants, Melvin and Mancha, copartners, by which the latter were appointed agents to lay out and plat into lots and small farms the plaintiffs' land, and sell the same upon the best terms obtainable, subject to certain restrictions. Among these in the power of attorney executed to the defendants were the following:

"The dwelling houses and other buildings upon the property at this time, and the quantity of ground you may think advisable to plat with them, you are hereby authorized to sell at a price to be concurred in by us, and your compensation on such sales shall be five per cent. upon the amount of sales of such buildings and grounds last aforesaid so sold. You are also authorized to lease any of the buildings and grounds for such time and upon such terms as you may deem advisable, not to interfere with sales. The revenue from the property so rented (until the same shall have been sold), shall be made sufficient for you to pay the usual insurance and taxes upon this entire property, which shall fall due after Dec. 31, 1889, until the expiration of your control thereof; and be made by you sufficient also

to meet the interest on the debt of five thousand dollars (now a lien on this property), which shall accrue from the 31st day of November, 1889, till said debt of five thousand dollars shall have been liquidated by the net proceeds of purchase money from all sales received from time to time, which purchase money shall be thus applied by us. If there should be any excess of rent realized above the amount necessary to pay said items of insurance, taxes and interest, said excess of rent shall be used by you in such repairs and improvements upon the buildings or lands as may be concurred in by us. The rate of eighty dollars (\$80) per acre (or in that proportion of price for a smaller quantity than an acre), shall be the lowest limit at which you are authorized to sell any of the lands, unless we shall hereafter agree to reductions or deem it advisable at the beginning of the enterprise to make concessions in price on small lots to persons purposing to erect buildings and other improvements thereon immediately; provided, however, that after one year from this date the lowest authorized price shall net us not less than the rate of eighty dollars per acre, and the eight per cent. per annum increase hereinbefore stipulated.

" We agree to allow you as compensation out of the gross proceeds of such sales, not hereinbefore specified, five per cent. on any lands sold at the aforesaid rate of eighty dollars per acre (or less than eighty dollars per acre in cases of concession), provided such sales shall not yield us less than the rate of eighty dollars per acre (less commissions), or if sold in smaller quantities than one acre, then in that proportion; if sold above the rate of eighty dollars per acre, we agree to allow you an additional commission of twenty-five per cent. of the excess of this rate up to one hundred dollars per acre, and if sold at the rate of more than one hundred dollars per acre, we agree to allow you (over and above the five per cent. and the twenty-five per cent. last stipulated), an additional commission of fifty per cent. of any excess you may obtain above said rate of one hundred dollars per acre."

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Statement of the Case.

The bill of complaint was filed by the appellees in December, 1892, and sets forth numerous alleged violations of duty and of their contract, on the part of the appellants, in respect of their management and sale of the property, and in respect of their receiving, accounting for and paying over the proceeds of the sale, and the rents and profits. The bill, among other things, alleges that these agents had sold, in their own individual names, many of these lots, and retained the proceeds of sale; that after demands made upon them by the plaintiffs, they still neglected and refused to pay over such proceeds, or large portions thereof; that even the collecting of the purchase money by them was without warrant of law, or of their contract, and in spite of the protests of the plaintiffs; that these agents had altogether refused or neglected "to discover or render any account of the rents and issues and profits of said real estate," as contemplated by their contract, and until recently "had refused and neglected to discover and render any account of the sales made by them of lots or portions of said real estate." The bill further alleges in substance, that these agents pretend and claim the right to sell lots on the long credit or monthly instalment plan, and to extend their collections of such small instalments over as long a period as they please, and claim to have the right to retain and use the various instalments so collected, until after the last instalment, for any particular lot sold, is paid to them; and that not until then can they be called on to pay anything to the plaintiffs, or even to render an account to them as to such particular lot sold.

It further alleges, that these agents claim that if any purchaser fails to complete his purchase by paying the last or any instalment of his purchase money, then all prior instalments actually paid by such purchaser belong to them, Messrs. Melvin and Mancha, and that in a number of instances they had acted on such claims, and refused to pay over to the plaintiffs any part of such payments, or even to account with the plaintiffs for the same. It alleges, that the

plaintiffs had then recently obtained from the defendants a statement as to lots sold, &c., which, on its face, purported to be "approximately correct," which the plaintiffs denied the accuracy of; that even according to that statement there was over \$3,000 in the hands of Messrs. Melvin and Mancha, received by them from these instalment sales, which they were using and enjoying, and refusing to pay any part of to the plaintiffs.

Among other forms of relief, it is asked, that the defendants may, upon their several corporal and respective oaths, answer and set forth full and perfect accounts of the sales of lots and of money received on account thereof, and when and from whom; and of money received by them from rents, issues and profits, and how applied; and may set forth a full and perfect list of all contracts of sale, vouchers, &c., relating to the sale or lease or renting of the property. The bill also asks that an account, or accounts, may be stated, under the direction of the Court, concerning the various sums of money received by the defendants from sales of said real estate and from rents and profits thereof, &c.; that in such accounts the defendants may be credited with their lawful compensation, &c., and that what may be found to be due from them to the plaintiffs, together with lawful interest upon the same, may be decreed to be paid.

The defendants answered, denying most of the allegations of the bill, and in regard to the accounts asked for, stated that they were willing to furnish the same if required so to do by the Court. After testimony was taken, the Court below (REVELL and JONES, JJ.) decreed that the injunction theretofore issued in the cause be dissolved, and that so much of the prayer of said bill as asks for the rescission of the contracts therein mentioned, between the plaintiffs and the defendants, be refused. And further decreed that the plaintiffs are entitled to relief in the premises as to an account or accounts from the defendants, concerning the proceeds of sale of those portions of the real estate in the proceedings mentioned, heretofore sold

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by the defendants, or either of them, by virtue of said contract; and concerning the rents and profits of said real estate, or the portions thereof which have been under the control of the defendants, or either of them, by virtue of said contract. And further decreed, that the defendants' account with the plaintiffs concerning said proceeds of sale, and said rents and profits, and that for the purposes of such accounting, and for such other purposes as the Court may deem proper and right in the further progress of this cause, that the bill of complaint be retained.

Thereafter the proceedings set forth in the opinion of the Court were had and the decree made from which this appeal was taken.

The cause was argued before ROBINSON, C. J., BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Daniel R. Magruder and Robert Moss, for the appellants.

J. Wirt Randall and James M. Munroe, for the appellees.

FOWLER, J., delivered the opinion of the Court.

The plaintiffs entered into a written agreement with the defendants, by the terms of which the latter were to take charge of, manage, lay out and plat into suitable lots certain lands owned by the former on the south side of Severn River, about one mile from Annapolis, and to develop and sell the same under certain conditions, as stipulated in the agreement just mentioned. It will be unnecessary for us to rehearse all these stipulations, for the main contention upon the merits of the case is based alone upon that which relates to the compensation the defendants are entitled to.

The plaintiffs filed their bill in the Circuit Court for Anne Arundel County, charging the defendants with having violated their contract in almost every particular, and with having combined and confederated for the purpose of injuring and defrauding the plaintiffs. The bill asked for a

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rescission of the contract, an injunction to stay and prohibit the defendants from doing anything further thereunder, and for an account of the various sums of money received by the defendants for the plaintiffs on account of sales of lots, and on account of issues and profits and sales of timber and crops. The defendants answered, denying all allegations of wrong-doing on their part, and also that there was any ground set forth in the bill which would warrant the abrogation of the contract or the issuing of an injunction as prayed, but expressing a willingness and readiness to account fully whenever required by the Court. Testimony was taken by both parties, and the cause having been fully argued and submitted to the Court below, the bill was dismissed as to the prayers for abrogation and injunction and held for an account. There was no objection made to this decree by the defendants, for it only directed them to do what they had already in their answer expressed a willingness and readiness to do whenever required. By it, however, the Auditor was directed to state the accounts called for, and, for the purpose of convenience and economy, the counsel of the respective parties agreed that the accounts should be stated by the parties or their solicitors from the proceedings and proof, subject to exception, and that in this respect the said decree should be modified. In accordance with this agreement each party stated and filed an account, and each excepted to that filed by the other.

The Court below adopted that of the plaintiff, and by its order of the 12th October, 1894, overruled the defendants exceptions thereto, except as to the one item of forty-two dollars and thirty-four cents, and sustained all the exceptions of the plaintiffs to the defendants' accounts. From this decree of the 12th October, 1894, the defendants have appealed, and have thus presented several questions.

The plaintiffs contend that there is only one question before us, and that is the correctness of the accounts which were ratified below, while the defendants insist that by virtue of their appeal they also bring up the question of the juris-

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dition of the Court below to pass the decree of the 27th of April, 1894, by which their bill was in part dismissed, and they were required to account. Although there may be some question as to whether the defendants did or did not consent to the passage of this decree, waiving this objection, we think they are not in a position now to assail it in this Court. Our Code provides (Art. 5, sec. 35) that "no defendant in a suit in equity in which an appeal may be taken shall make objection to the jurisdiction of the Court below, unless it shall appear by the record that such objection was made in said Court." Nor does it avail the defendants that this question may have been made by them in argument below, and was passed upon by the Judge below. This does not gratify the requirements of the section just cited. The objection must be specially taken by exception filed. *Hubbard and Wife v. Jarrett*, 23 Md. 66. But, as we have seen, so far from having filed an exception, the defendants offered themselves ready to do what they now contend the Court had no power to require them to do.

The only questions, therefore, now open for review, are those presented by the decree ratifying the accounts filed by the plaintiffs. This account, which is designated as "Account Complainants, No. 1," was ratified by the order of the 12th of October, 1894, with one modification, namely, an additional credit of \$42.34 was allowed the defendants, thus making the total indebtedness found to be due by the defendants to the plaintiffs to be the sum of \$1,673.27, with interest from the institution of the suit. There was no objection made to the accuracy of the ratified account, but the objections are confined to the principles upon which it is stated. We think, however, there is no error in this respect. The claims set up by the defendant cannot be maintained.

1. Upon a fair and reasonable construction of the contract, whatever may have been the practice of the parties under it, we think it clear that the defendants, as agents, had no authority to collect and receive from the purchasers the proceeds of sales of lots. On the contrary,

the contract itself stipulates that such proceeds should be applied by the plaintiffs to the payment of a debt of \$5,000, which was a lien on the property, and that the defendants should make the revenues from the property, until sold, sufficient to pay the taxes, insurance and the interest on said debt of \$5,000. That is to say, the plaintiffs were to collect the proceeds of sale, and therewith reduce or pay in full, if possible, said lien, while the defendants were to collect the rents and apply them to interest, taxes and insurance. But this question is not important now, for it appears that the defendants have been, with the consent of the plaintiffs, allowed in the ratified account commissions on all proceeds of sale actually collected.

2. The next claim made by the defendants is that they should have been allowed commissions on the entire purchase money out of the first instalments collected by them. But such a contention is based on neither justice, reason nor authority. It is true that the general rule has often been approved by this and many other Courts, that commissions are earned when the agent or broker finds a purchaser able and willing to complete the purchase according to the terms agreed on, and who ultimately becomes the purchaser. *Kimberly v. Henderson et al.*, 29 Md. 515. If the purchase money be not paid by the fault of the vendor, the agent would still be entitled to his compensation. But, as was held in *Richards v. Jackson*, 31 Md. 253, the meaning of *Kimberly v. Henderson* is that "it is not sufficient to entitle the broker to commissions that the purchaser should enter into an agreement to purchase, but he must actually purchase, by complying with the terms agreed on, unless his failure to do so is occasioned by the fault of the vendor." The only fair and equitable rule where the purchase money is, as here, payable in instalments, is to allow commissions on the instalments as paid from time to time, for until they are actually paid the terms of the sale have not been complied with. Any other construction would only offer inducements to sell for the purpose of securing all .of

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the commissions out of the first payment. In the case of *McCulloh v. Pierce*, 55 Md. 546, it was held that a trustee in the case of a defaulting purchaser should have commissions only on the amount actually collected by him, and it was there said, "any other rule would operate unjustly, and would offer a temptation * * to make sales to irresponsible bidders at extravagant prices without any reasonable expectation that the terms of sale would be complied with." And this language, we think, is particularly applicable here, though we are not to be understood as intimating that there is any evidence before us to show that the defendants acted in bad faith in this respect. The construction of the contract urged by them would, however, enable unfaithful agents thus to defraud their principals.

3. The defendants claimed, as their own, all instalments paid to them in cases in which the whole purchase money was not paid, and the purchasers have abandoned their purchases. We entirely agree with what the learned Judges below said in regard to this claim. They characterized it as "utterly untenable; not within the terms or spirit of the contract; by no rational construction to be inferred therefrom, and repugnant to every principle of law and equity."

4. Interest was properly allowed. The defendants, as agents, should have promptly paid over to their principals the amounts collected, less commissions, as provided by the contract, and having failed to do so, they have no reason to complain if they are required to pay interest from the institution of the suit.

5. Nor do we see how the Court below could have done otherwise than reject the credit claimed by the defendants for money loaned to J. West Aldridge—that being a transaction between them and him in which the other plaintiffs are in no wise interested.

Finding no error, the decree of the 12th October, 1894, will be affirmed.

Decree affirmed.

(Decided June 18th, 1895.)

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558.

1745, chap. 9, sec. 10. Relating to improvements made by riparian owners. 266.

1804, chap. 51. Incorporating the Baltimore and Frederick-town Turnpike Road. 255.

1805, chap. 10, sec. 7. Relating to insolvents. 82.

1806, chap. 90. Providing for the practice in the Court of Appeals when a party to a cause dies. 649.

1816, chap. 247. Prescribing the duties of the Attorney-General.
312.

1818, chap. 216. Providing for the limitation of actions at law.
450, 558.

1832, chap. 306. Providing for proceedings to forfeit charters of corporations. 312.

1845, chap. 267. Relating to mechanics' lien claims. 395.

1847, chap. 306. Incorporating the Withers Mining Co. 30.

1849, chap. 469. Incorporating the Cumberland and Pennsylvania R. R. Co. 30, 35.

1854, chap. 193. Concerning the estates of insolvents. 82.

1856, chap. 16. Relating to *quo warranto* proceedings against officers. 311.

1868, chap. 471, sec. 176. Relating to proceedings against corporations. 313.

ACTS OF ASSEMBLY—*Continued.*

- 1872, chap. 270. Relating to contracts and conveyances by married women. 484, 499.
- 1872, chap. 436. Providing for actions of ejectment by landlord against tenant. 628.
- 1874, chap. 483. Relating to sales by tax collectors. 217.
- 1876, chap. 64. Amending the charter of the Cumberland and Pennsylvania R. R. Co. 32, 34, 35.
- 1878, chap. 268. Providing for administration on estate of a wife dying intestate. 648.
- 1878, chap. 347. Relating to coroners in Baltimore City. 363.
- 1878, chap. 409. An Act extending the corporate existence of the Withers Mining Co. 31, 32.
- 1882, chap. 477. Providing for administration on the estate of a wife dying intestate. 648.
- 1890, chap. 364. Concerning preferences by insolvents. 464.
- 1890, chap. 573, sec. 21. Providing for appeals from Registers of Voters. 290.
- 1892, chap. 506. Regulating appeals in criminal cases. 602.
- 1892, chap. 684. Relating to the construction of deeds. 79.
- 1894, chap. 162. Authorizing the Baltimore, Catonsville and Ellijcott Mills Railway Company to use electricity. 253, 257.
- 1894, chap. 185. Providing for the submission of special interrogatories to the jury. 105.
- 1894, chap. 215. Providing for additional County Commissioners of Charles County. 309.
- 1894, chap. 232. Prohibiting pool selling. 343, 344.
- 1894, chap. 247. An Act to provide for the treatment and cure of habitual drunkards. 113.
- 1894, chap. 262. Amending the law relating to perjury. 601.
- 1894, chap. 380. Providing for licenses to take and sell oysters. 297, 514, 515, 517.
- 1894, chap. 405. Relating to the time within which a caveat to a will may be filed. 554.
- 1894, chap. 620. Providing for the erection of a public school building in Annapolis. 8, 12.

See CODE PUBLIC GENERAL LAWS.

CODE PUBLIC LOCAL LAWS.

STATUTORY CONSTRUCTION.

ADEMPTION OF LEGACY.

See DEVISE AND LEGACY, 7

AGENCY.

1. A contract provided that the defendants, as agents of the owners of a tract of land, should lay out, develop and sell the same in lots and be entitled to certain commissions on sales. Some of the lots were sold under contracts by which the purchase money was made payable in instalments. *Held*,
 1st. That the agents are not entitled to the full commission on the entire price of a lot out of the first instalment collected by them, but are entitled only to commissions on the instalments as paid from time to time.
 2nd. That when purchasers renounced their contracts and forfeited instalments already paid, the agents are not entitled to the whole of such instalments.
 3rd. That the agents are liable for interest on all amounts collected by them and not paid over promptly to their principals, less their commissions.
 4th. That the agents are not entitled to credit for money loaned by them to one of the owners, that being a transaction in which his co-owners were not concerned. *Melvin v. Aldridge*, 650.
2. The contract in the above case also provided that, until a certain mortgage incumbrance on the land should be paid, the money arising from the sale of lots should be applied by the owners to the payment of the mortgage. *Held*, that the agents had no authority to collect such purchase money. *Ibid.*

See STATUTE OF FRAUDS, 2, 3.

ANIMALS.

See MUNICIPAL CORPORATIONS, 1, 2.

APPEAL.

1. Where incompetent evidence to prove a particular fact has been improperly admitted at the trial below, the judgment will not be reversed if the same fact has been subsequently proved by competent evidence. *Balto. & Ohio R. R. Co. v. Cain*, 87.
2. A judgment will not be reversed on account of the refusal of the trial Court to strike out testimony improperly admitted, when the same facts have been proved by competent evidence. *B. & O. R. R. Co. v. State, use of Chambers*, 371.
3. The record in this case showed that on October 6 there was a verdict for the plaintiff, and that on the same day judgment was entered thereon, and a motion for a new trial filed; that the motion was overruled on January 2 following, on which latter day an appeal was prayed, but there was no entry of a judgment after the motion was overruled. Upon a motion to dismiss the appeal, because not taken within

APPEAL—Continued.

two months after final judgment, *Held*, that it must be assumed that there was a mistake in the entry of the judgment on the verdict while the motion for a new trial was pending; and since there was nothing to show a judgment after it was disposed of, the appeal must be dismissed without prejudice, on the ground that no final judgment had been entered, to the end that the appellant may have the entry of judgment on October 6 stricken out and final judgment entered *Heiskell v. Rollins*, 397.

4. When a bill is filed by an executor for the construction of the will of his testator, he has a right to appeal from a decree construing the same. *Littig v. Hance*, 416.
5. The certificate of the trial Judge, contained in the record, as to what was proved at the trial, will be considered on appeal, although not embodied in a bill of exception, when such certificate refers to the matter of the exception. *Owens v. Owens*, 518.
6. An exception was taken to the action of the trial Court in rejecting certain evidence. Subsequently this fact was proved in the case by another witness, and it was so stated in a certificate of the trial Judge filed the same day as the bill of exception. *Held*, that such certificate would be considered on appeal in connection with the exception. *Ibid.*
7. Since the Act of 1892, ch. 506, appeals in criminal cases are upon the same footing as appeals in civil cases, and in neither case can an appeal be taken till after final judgment. *State v. Floto*, 600.
8. If there is a judgment on demurrer and no exceptions, the case may be brought up for review either by appeal or by petition as upon writ of error. And if in the latter mode, the provisions of Code, Art. 5, sec. 4, must be complied with. *Ibid.*
9. Where one of the parties to an appeal dies after the cause has been argued and submitted, the judgment of the Court of Appeals has the same effect, under Code, Art. 5, sec. 75, as if the party were alive. *Moore v. Taylor*, 644.
10. A bill in equity was filed for an injunction, the rescission of a contract, and a discovery and account of money received by the defendants, as agents of the plaintiffs, to sell certain lands. The defendants, while denying the material allegations of the bill in their answer, professed their readiness to account. The bill was dismissed as to all the relief asked for except an accounting. No special exception was filed to the jurisdiction of equity to decree payment of the sum due, but the same was made in the argument below. *Held*, that this objection to the jurisdiction could not be availed of on appeal. *Melvin v. Aldridge*, 650.

See COSTS.

ELECTIONS AND VOTERS, 1, 2.

ARREST.

See **FALSE ARREST AND IMPRISONMENT, 1-6.**

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where a party executes a deed conveying all his property to a trustee for the benefit of creditors, and the trustee subsequently under an order of Court reconveys the property to the grantor, the effect of the deed of trust is entirely nullified; and the mere fact that a creditor of the grantor filed a claim in the cause after the passage of the order and before the actual reconveyance, does not suspend its operation. A subsequent purchaser from the grantor acquires a good title.
Moore v. Taylor, 644.

See **EQUITY, 3.**

ATTACHMENTS.

See **EQUITY, 3.**

LIMITATIONS, I.**AUCTIONEER.**

See **STATUTE OF FRAUDS, 2, 3.**

AUTOPSY.

See **CORONER, I-4.**

BALTIMORE CITY.

See **CORONERS.**

MUNICIPAL CORPORATIONS.**RAILROAD COMPANIES.****BANKS.**

A bank cashier has no authority by virtue of his office to accept a new note for an existing indebtedness to the bank so as to discharge a surety on the first note, or to make a contract so to do. *Gray v. Farmers' Bank, 631.*

See **PRINCIPAL AND SURETY, 3.**

BENEFIT SOCIETIES.

1. When it is agreed that the statements contained in an application for membership in a Relief Association shall constitute a warranty and their truth a condition of payment, then a statement by the applicant that he was married to the person named as beneficiary, when in fact he was not, vitiates the contract of insurance and defeats the rights of any one to recover thereon. *Smith v. B. & O. R. R. Co., 412.*

BENEFIT SOCIETIES—*Continued.*

When a certain person is named as the beneficiary in the insurance contract of a Relief Association, only that person has a right to sue thereon. *Ibid.*

The Relief Department of the defendant company makes payments to members disabled by injury, or to their families in the event of death. The person named as beneficiary in the contract was required to be the wife or relation of the party insured. Membership in the association was obligatory upon certain classes of defendant's employees as a condition of employment, and voluntary with other classes. The truth of the statements contained in the application for membership was made by the contract a warranty and condition of the payment of benefits. S., the father of the plaintiff, was divorced *a vinculo* from plaintiff's mother under a decree prohibiting his re-marriage during her life. He became a member of the association, falsely stating in his application, that the beneficiary therein named was his wife. Upon the death of S. the plaintiff, his son, sued to recover the death benefit. *Held,*

1st. That plaintiff was not entitled to recover, because the false statement in the application avoided the contract, and also because the plaintiff, not being named as beneficiary, could not maintain the action.

2nd. That even if the deceased was obliged, as a condition of employment by the defendant, to become a member of the association, he was not thereby relieved from the obligation to state the facts truthfully in his application. *Ibid.*

BILL OF EXCEPTION.

See APPEAL, 5, 6.

BILL OF SALE.

See EQUITY, 10.

BILLS AND NOTES.

See PRINCIPAL AND SURETY, 1, 3.

BONA FIDE PURCHASER.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

CORPORATIONS, 11.

HUSBAND AND WIFE, 6.

VENDOR AND PURCHASER, 1, 2.

BONDS.

See CORPORATIONS, 7.

BOUNDARIES.

See **DEEDS**, 1.

LANDLORD AND TENANT, 5.

BREACH OF PEACE.

See **FALSE ARREST AND IMPRISONMENT**, 1-6.

BROKERS.

See **AGENCY**, 1.

CARRIERS.

1. In order to become a passenger and entitled to protection as such at the hands of the carrier, it is not necessary that a person shall have paid his fare or entered a train, but he is such as soon as he comes within the control of the carrier at the station, through the usual approaches, with intent to become a passenger by paying fare, either before or after entering the train. *B. & O. R. R. Co. v. State, use of Chambers*, 371.
2. A party who buys a railroad ticket acquires a right to be conveyed to his destination in one of the carrier's passenger coaches. *Baldo. and Potomac R. R. Co. v. Swann*, 400.

See **FALSE ARREST AND IMPRISONMENT**, 1-6.

NEGLIGENCE.**CASHIER.**

See **BANK**, 1.

PRINCIPAL AND SURETY, 3.

CAVEAT.

See **WILLS**.

CHATTEL MORTGAGE.

See **EQUITY**, 10.

CODE OF PUBLIC GENERAL LAWS.

- Art. 5, sec. 4. Appeals in criminal cases. 602.
Art. 5, sec. 6. Time within which appeal to be taken. 398.
Art. 5, sec. 9. Jurisdiction on appeal. 290.
Art. 5, sec. 35. Objection to the jurisdiction on appeal. 657.
Art. 5, sec. 36. Remanding causes by the Court of Appeals. 24, 620.
Art. 5, sec. 75. Abatement in the Court of Appeals. 649.
Art. 5, sec. 77. Appeal in criminal cases. 602.

CODE OF PUBLIC GENERAL LAWS—*Continued.*

- Art. 16, sec. 47. Relating to habitual drunkards. 114.
Art. 16, sec. 161. Relating to decrees and pleadings in equity. 582.
Art. 23, sec. 167. Condemnations by railway companies. 257, 536.
Art. 23, sec. 169. Use of streets by railway companies. 536.
Art. 23, sec. 255. *Quo warranto* against corporations. 311, 313.
Art. 24, sec. 9. Rule security for costs. 220.
Art. 27, secs. 226, 228. Perjury. 601.
Art. 45, sec. 2. Contracts and conveyances by married women. 483, 499.
Art. 46, sec. 29. Legitimation of children. 128.
Art. 47, sec. 11. Distribution of estates of insolvents. 82.
Art. 47, sec. 14. Preferences by insolvents. 464.
Art. 53, sec. 18. Distress for rent. 81, 82.
Art. 57, sec. 5. Limitation of actions. 448, 459, 452.
Art. 59, sec. 1. Commitment of lunatic paupers. 114.
Art. 62, sec. 5. Marriage licenses. 601.
Art. 63, sec. 9. Mechanics' liens. 395.
Art. 66, sec. 11. Sales under mortgages. 549.
Art. 69, secs. 4 and 5. *Quo warranto* against officers. 311.
Art. 72, secs. 12, 29, 66, 67. Licenses under the oyster law. 297, 304, 515, 517.
Art. 75, sec. 3. Requisites of pleadings. 597.
Art. 75, sec. 23, sub-sec. 108. Admissions in pleadings. 505.
Art. 75, sec. 70. Action of ejectment by landlord. 628.
Art. 81, sec. 52. Sales for taxes. 217.
Art. 93, sec. 32. Administration on estates of married women. 648.
Art. 93, sec. 309. Testamentary capacity. 556.
Art. 93, sec. 326 A. Caveat to wills. 554.

CODE OF PUBLIC LOCAL LAWS.

- Art. 2, sec. 144. Relating to the powers of the Mayor, etc., of Frostburg. 61.
Art. 4, sec. 149. Relating to coroners in Baltimore City. 363.
Art. 10, sec. 260. Relating to oyster licenses in Dorchester Co. 514.

COMMISSIONS.

See AGENCY, 1.

CONDEMNATION.

See EMINENT DOMAIN.

CONDITIONS.

See DEEDS, 3, 4, 5.

CONSTITUTIONAL LAW.

1. The Legislature has the power to provide for the erection of a public school building within the limits of a city, and to direct the municipal authorities to issue bonds for the purpose of paying for such building, with or without the consent of the voters of the city. *Revell v. Mayor, etc., of Annapolis*, 1.
2. The Legislature has the right to compel a municipal corporation to levy a tax or incur a debt for a public purpose, or one within the ordinary functions of municipal government. And the erection of a building for a public school is such a purpose. *Ibid.*
3. The Act of 1884, ch. 620, provided for the erection of a public school building in the city of Annapolis, in Anne Arundel County, and to pay for the same, directed the County Commissioners of Anne Arundel County to issue bonds to the amount of \$20,000, and also directed the city of Annapolis to issue bonds to the amount of \$10,000, without submitting the question of their issue to a vote of the citizens of Annapolis. The charter of the city authorized the Mayor, &c., to issue bonds, provided the loan was approved by a majority of the voters. The city authorities refused to issue the bonds directed by the Act, without first submitting the question to a popular vote. Upon a petition for a *mandamus* to compel the issue, filed by the Building Committee, appointed under the Act, *Held*,
 - 1st. That the Act was a valid exercise of the legislative power.
 - 2nd. That the apportionment of the cost of the building between the county and the city was a matter within the discretion of the Legislature.
 - 3rd. That although a general law provides that the public schools of a county shall be under the control of the School Commissioners, with power to build and repair school houses, yet such law does not authorize them to borrow money, or provide for the apportionment of the cost of erecting buildings; and therefore, the Act in question is not in violation of Constitution, Art. 3, sec. 33, which provides that the General Assembly shall pass no special law, in any case, for which provision has been made by an existing general law.
 - 4th. That the Act is not repugnant to the Fourteenth Amendment of the Constitution of the United States, since the levy of taxes to pay for bonds lawfully issued by a municipality is not a taking of property without due process of law. *Ibid.*
4. The Legislature has the power to require municipal corporations to pay for the medical treatment of habitual drunkards residing within the municipality, who may be committed by

CONSTITUTIONAL LAW—*Continued.*

the Courts to a medical institution for such treatment, and who are themselves unable to pay for the same. *M. & C. C. of Baltimore v. The Keeley Institute*, 106.

5. The Act of 1894, ch. 247, provides that where a petition to a Circuit Court sets forth that a certain person is an habitual drunkard, a resident of the county or city, that neither the petitioner nor such person is able to defray the expense of medical treatment for drunkenness, and where such person agrees in writing to take such treatment, then the Court shall send such habitual drunkard to some institution for the cure of drunkenness, and order that the expense thereof, not exceeding \$100, be paid by the county or city where the drunkard resides. Under this Act the Circuit Court of Baltimore City committed a certain person to the Keeley Institute, and ordered that the sum of \$100 for the expense of his treatment be paid out of the treasury of the city. The proceedings in the Circuit Court were *ex parte*, without notice to the municipal authorities, and upon their refusal to pay said sum, a petition was filed by said Institute praying for a writ of *mandamus* commanding such payment to be made. Upon appeal from an order directing the *mandamus* to issue as prayed, *Held*,
- 1st. That the Act in question is valid under the Constitution of Maryland; the expense of the treatment of pauper drunkards being an expenditure for a public purpose, and the Legislature having the power to compel municipal corporations to perform any act within the ordinary functions of municipal government.
- 2nd. That although no provision is made for notice to the city of the proceeding, or an opportunity afforded to contest the allegations of the petition, yet the Act is not in violation of the Constitution of the United States, as depriving the city of its property without due process of law. *Ibid.*
6. The title of the above-mentioned Act was "An Act to provide for the treatment and cure of habitual drunkards." In the body of the Act provision is made for treatment only. *Held*, that the Act is not in violation of Art. 3, sec. 29 of the Constitution, which provides that every law enacted by the General Assembly shall embrace but one subject, and that shall be described in the title. *Ibid.*
7. The provisions of Code, Art. 24, sec. 9, requiring non-resident plaintiffs to give security for costs, when a rule is laid upon them, is not in conflict with Art. 4, sec. 2 of the Constitution of the United States, concerning the privileges and immunities of the citizens of the several States. *Holt v. Tennytown, etc., Co.*, 219.

CONSTITUTIONAL LAW—*Continued.*

8. The Legislature has the constitutional right to require the payment of a license fee for the privilege of carrying on a particular kind of business; and the question as to what occupations shall be licensed and what rates shall be charged, must generally be left to the discretion of the Legislature. *State v. Applegarth*, 293.
9. The oyster beds of the Chesapeake Bay are the property of the State, and the Legislature has the power to pass laws determining when oysters can be taken, and to make all reasonable regulations concerning the same. *Ibid.*
10. Code, Art. 72, as amended by the Act of 1894, ch. 380, requires every person engaged in the business of packing or canning oysters for sale or transportation to take out a license, paying therefor a sum graduated according to the quantity of oysters packed by the applicant; the money so obtained to be placed to the credit of the Oyster Fund and used in maintaining a police force for the protection of oysters, etc. *Held*,
 - 1st. That the license fee so required is not a tax on property, but license tax on business or occupation.
 - 2nd. That the provision requiring such license fees to be paid into the Oyster Fund is not open to objection, since, if the Legislature has the right to impose the tax, it can determine what shall be done with the money arising from it.
 - 3rd. That such tax is not a regulation of inter-state commerce within the Constitution of the United States, since no exemption can be claimed from a general tax on business, upon the ground that the products thereof may be used in commerce. *Ibid.*
11. The above mentioned Act of 1894, was entitled, An Act to repeal Art. 72 of the Code, title "Oysters," and to re-enact the same with amendments; and it provided that persons engaged in the business of packing oysters should pay a license tax. *Held*, that the Act was not in violation of Constitution, Art. 3, sec. 29, as embracing a subject distinct from the title. *Ibid.*
12. Where a statute provides that no will shall be subject to caveat after the expiration of three years from its probate, no retro-active effect can be given to it, because that would operate to deprive parties of vested rights by taking away all remedy. *Garrison v. Hill*, 551.
13. The above Act cannot be said to be unconstitutional merely because there was no saving clause in favor of those under disability, such as coverture, infancy, etc. It is discretionary with the Legislature whether or not such persons shall be exempted from the operation of a Statute of Limitations, and unless the statute does exempt them they are governed by the same law that others are. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

14. Where the title of an Act is to add an additional section to a certain Article of the Code, it is a sufficient compliance with the Constitution, Art. 3, sec. 29, which provides that the subject of every law shall be described in its title. *Ibid.*

See EMINENT DOMAIN, 1, 3.

CONSTITUTION OF MARYLAND.

- Declaration of Rights, Art. 15. 297, 302.
Art. 1, sec. 2. Disfranchisement of convicts. 601.
Art. 1, sec. 5. Registration laws. 290.
Art. 3, sec. 59. Titles of statutes. 117, 554.
Art. 3, sec. 33. Special laws. 13.
Art. 3, sec. 40. Condemnation of property. 321.
Art. 4, sec. 15. Practice in Court of Appeals. 649.
Art. 8, sec. 1. Public school system. 9.
Art. 11, sec. 9. Corporation of Baltimore City. 115.
Constitution of 1851, Art. 3, sec. 5. State's attorneys. 312.

CONSTITUTION OF UNITED STATES.

- Art. 1, sec. 8. Regulating commerce. 297, 305.
Art. 4, sec. 2. Privileges and immunities. 220.
14th Amendment. Due process of law. 13, 117.

CONTRACTS.

1. Where services are rendered by one party for another, without any express agreement as to his compensation, he is entitled to be paid the fair value of such services. *Boyce v. Worley*, 197.
2. Where a building contract provided that extra work in excavating the foundation should be estimated and paid for in a certain way, and the builder, after doing extra work, but not according to the provisions of the contract, did not demand payment therefor until more than a year afterwards, and the claim being disputed, was referred to arbitration, such facts do not justify the contractor in abandoning work on the building, or prevent the other party from completing the same at his expense. *Davis v. Ford*, 333.
3. The fact that after a contractor has abandoned work on the building, an agreement is made between him and the owner to go on with the work, which agreement the contractor makes no effort to perform, does not furnish an excuse for the breach of the original contract. *Ibid.*
4. Where a party has a right either to rescind a contract or to continue it in force, his election when once made is final, and he cannot afterwards alter his determination. *Cole v. Hines*, 476.

CONTRACTS—*Continued.*

5. A. boarded with the plaintiff for a number of years, paying a certain sum for board and lodging. For some years before his death he was frequently ill, and was constantly nursed by plaintiff, and for these services A. promised to pay, but no price was fixed. In an action against his administrator to recover for the same, *Held*, that there was evidence sufficient in law to establish a contract to pay for such services, there being no relationship between the parties. *Wallace v. Schaub*, 594.
6. In the above action, the evidence of a trained nurse, acquainted with the value of the services of nurses, trained and untrained, is admissible to show the value of the services rendered by the plaintiff. *Ibid.*

See CORPORATIONS, 2, 3.

DAMAGES, 1, 2, 3, 6.

HUSBAND AND WIFE, 3-5.

LANDLORD AND TENANT, 5.

CORONER.

1. Under the local law of Baltimore City, the coroners have power to hold inquests and order autopsies to be made, when, in their judgment, an autopsy is an appropriate means of ascertaining the cause of a person's death. *Young v. College of Physicians and Surgeons*, 358.
2. And in such case a coroner may lawfully order an autopsy to be made without the consent of the family of the deceased. *Ibid.*
3. A physician who makes a *post-mortem* examination in the usual manner and in pursuance of the authority of the coroner, is not liable in an action to the family of the deceased for the mutilation of his body without their consent. *Ibid.*
4. A man in vigorous health, whose leg was crushed below the knee in a railroad accident, was carried to a hospital managed by one of the defendants, where he died the next day. The coroner was notified, and considering that the accident was not of itself sufficient to cause death; he ordered a *post-mortem* examination to be made. This was accordingly performed by the defendant K., but without the knowledge of the family of the deceased. In an action by the widow of the deceased against the coroner and K. and the hospital authorities to recover damages for the mutilation of the corpse without her consent. *Held*,
- 1st. That since the coroner had authority to order autopsies to be made, and there was no evidence to show that in directing this one to be made he acted maliciously or corruptly, the plaintiff was not entitled to recover against him.

CORONER—*Continued.*

- 2nd. That K. was likewise not liable if he performed the *post-mortem* by order of the coroner, and did so without wantonly mutilating the corpse.
- 3rd. That the hospital authorities having no further connection with the matter than to allow their rooms to be used, they were not liable.
- 4th. That the evidence of an undertaker to show the effect ordinarily produced on a dead body by a *post-mortem* was admissible. *Ibid.*

CORPORATIONS.

1. Where a statute provides that the charter of a certain company shall be continued in full force for the period of thirty years, such statute operates merely to revive and extend the charter of the company, and does not create a new and distinct corporation. *Frostburg Mining Co. v. C. & P. R. R. Co.* 28.
2. If a party is induced to subscribe for shares of the stock of a corporation upon the faith of certain representations contained in a prospectus issued by the company, which representations are false, and within a reasonable time after the discovery of the fraud, and before the insolvency of the company, he notifies the company that he repudiates the contract, these facts constitute a valid defence to an action to recover the subscription. *Fear v. Bartlett*, 435.
3. The subscriber to the stock is released in such case because he has exercised his right to avoid a contract obtained by fraud. The subsequent insolvency of the corporation does not make him liable on such a contract, and the equities of the creditors of the company are not superior to his own. *Ibid.*
4. The doctrine that unpaid subscriptions to the capital stock of a corporation are a trust fund for the benefit of its creditors, does not apply so as to prevent a defrauded shareholder from rescinding his contract before proceedings in insolvency have been instituted against the company, or what is regarded in law as an act of insolvency committed. *Ibid.*
5. Defendant's contract of subscription was made in July, 1890. Two months thereafter, upon discovering the alleged fraud, he repudiated the subscription. A year afterwards defendant paid to a director of the company one thousand dollars, "in order to save what he had already paid," but at the same time declared that he did not intend to make any further payment on his subscription. Defendant was unable to read or write. *Held*, that under these circumstances, such payment could not be treated as amounting to a ratification of the contract of subscription. *Ibid.*

CORPORATIONS—*Continued.*

6. Where the promoters of a corporation, by falsely representing to a vendor that improvements of great value will be placed upon the property and paid for, induce such vendor to convey the same to the corporation and accept in part payment second mortgage bonds, so as to let in as a first lien certain first mortgage bonds which are held by the said promoters, who also issue to themselves shares of stock in the corporation upon which they pay nothing, then the lien of such first mortgage cannot obtain priority over the second mortgage for the unpaid purchase money. *Hooper v. Central Trust Co.*, 559.
7. Where the promoters of a corporation, by various devices, cause shares of stock to be issued as full paid, as if in consideration of property acquired by the corporation, when in fact the property was not paid for by the shares, and the same are assigned to the promoters, who also hold the bonds secured by a first mortgage on the estate of the corporation, then such promoters cannot recover as creditors of the corporation and first mortgage bondholders without paying the amount due by them to the company as stockholders, if the rights of a vendor of the property to the corporation are thereby put in jeopardy. *Ibid.*
8. When the property of a private corporation has been placed in the hands of a receiver, all expenses for safe-keeping and preservation are properly payable out of the income, or if there be none, then out of the proceeds of the *corpus* of the estate when sold. *Ibid.*
9. But this power by no means includes authority in such case to allow the creation of liens through the medium of receivers' certificates which will take priority over existing liens. *Ibid.*
10. A suit by a receiver, or by the creditors of a corporation, to enforce payment of unpaid subscriptions to the capital stock, is governed by the law of the domicil of the corporation. *Ibid.*
11. The promoters of a corporation, through their agents, bought certain land from H., it being agreed that \$100,000, being a part of the price, should be paid in second mortgage bonds of the M. Co., to be thereafter formed. This company's purpose was the manufacture of ice, and the contract with H. provided that machinery, etc., to the value of \$130,000, should be placed upon the property. One of the promoters guaranteed to H. the erection of the machines, and stated that he then had in his hands the funds necessary to pay for the same. This guaranty was not true and was not performed. The machines were furnished by the A. Co. under a contract reserving title to that company until payment of the price. Upon the faith of the guaranty H. executed a deed to the M. Co. of the property, and that company then

CORPORATIONS—*Continued.*

executed two mortgages to a Trust Co.—the first to secure an issue of \$250,000 of M. Co.'s bonds, and the second to secure an issue of \$110,000 of bonds. Of these latter second mortgage bonds, \$100,000 were given to H. in pursuance of the contract of purchase, and \$10,000 in settlement of another transaction. The M. Co. issued shares of stock of the par value of \$500,000, stated to be issued for property purchased, but upon which, in fact, nothing was paid, the property having been purchased partly with money and partly with the \$100,000 second mortgage bonds. All of the shares of stock were assigned to the different promoters and their agents, and the said promoters were also the holders of the first mortgage bonds. Default having been made in the payment of interest on these bonds, the Trust Co., on behalf of the holders of the same, filed a bill for a receiver and foreclosure and sale, to which the M. Co. consented. Under this bill a receiver was appointed, who managed the affairs of the company and issued certificates of indebtedness. The A. Co., which had erected machinery on the mortgaged premises, intervened in the case and obtained a decree for the payment of its claim, the Court holding that the first mortgage bondholders were not *bona fide* purchasers without notice of the contract with the A. Co., but that the same was made by their agents. Some of the promoters paid the A. Co. and took an assignment of its decree against the M. Co. H., the holder of the second mortgage bonds, then came into the case by petition and filed a cross-bill and answer, claiming that the holders of the first mortgage bonds were not entitled to priority over the second mortgage bonds, so issued for the purchase money of the property, and that the first mortgage bondholders should be required to pay the amount due by them as stockholders in excess of the sum due to them on their bonds. *Held,*

- 1st. That the first mortgage bondholders were not *bona fide* purchasers of the bonds without notice, but were the real purchasers of the property and owe to the vendor the balance of the purchase money, and that since they induced the vendor to waive his lien in favor of the first mortgage bonds by the false representations contained in the guaranty, they cannot now claim a preference over the lien of the second mortgage bonds.
- 2nd. That the first mortgage bondholders are not entitled to a preference to the extent of the decree assigned to them by the A. Co., as against H., since they were really the debtors of the A. Co. and simply paid their own debt.
- 3rd. That a decree should be passed for the sale of the mortgaged property, and giving to the second mortgage bondholders, in the distribution of the proceeds, a priority, to the

CORPORATIONS—Continued.

extent of \$100,000 and interest, and interest on overdue interest, over the first mortgage bonds, and also priority over the receivers' certificates and the decree of the A. Co. assigned to the first mortgage bondholders. *Ibid.*

See EMINENT DOMAIN.

FRAUDULENT CONVEYANCES, 1, 2.

RAILROAD COMPANIES.

COSTS.

1. Where the decree of the Court of Appeals reverses the decree below, remands the cause for further proceedings, and directs the costs to be paid by the appellee individually, this includes all costs in the Court of Appeals and the Court below, while such costs as are incurred after the cause is remanded, will abide the final result. *Garrison v. Hill*, 206.
2. A rule security for costs laid upon the plaintiff in one Circuit Court, is subsequently enforceable in the Circuit Court of another county, to which the case is removed for trial; and the removal does not make any change in the time within which the plaintiff is required to comply with the rule. *Holt v. Tennallytown, etc., Co.* 219.
3. The right of a defendant to move for a judgment of non-suit for the failure of the plaintiff to comply with a rule security for costs, is not lost by a delay of eight months, but continues up to the time of trial. *Ibid.*

COVENANT.

See DEEDS, 4.

CRIMINAL LAW.

1. The Act of 1894, ch. 232, making it unlawful to gamble or make pools on the result of any horse race, etc., contained an exception providing that it should not be unlawful to make a pool or bet within the grounds of any agricultural association upon a race held within the same on the same day. A criminal information against the defendant charged that he made pools, etc., in this State on the result of a race at Sheepshead Bay, in the State of New York. *Held*, That such averment sufficiently negatived the exception in the statute. *Stearns v. State*, 341.
2. The said Act provided that it should be unlawful for any person to gamble or make books and pools on the result of any trotting race or running race of horses, or race of any kind, or to keep or use or knowingly suffer to be used any house for the purpose of making or selling any book or pool, or

CRIMINAL LAW—*Continued.*

otherwise betting upon the result of any trotting race or running race. The information against the defendant charged that he unlawfully made books and pools on the result of a trotting race or running race of horses on a certain race track ; that he unlawfully kept a house for the purpose of making or selling pools on the result of a certain trotting or running race ; that he used a house for said purposes, etc. Upon demurrer, *Held*, that the information was bad for duplicity, in that it charged the alleged offence disjunctively or in the alternative. *Ibid.*

3. An indictment charging that the traverser, for the purpose of procuring a marriage license falsely, etc., made oath before a Clerk of Court as to certain material facts, is sufficient in law, the Clerk having authority under the statute to administer the oath. *State v. Floto*, 600.

See APPEAL, 7, 8.

FALSE ARREST AND IMPRISONMENT, I-6.

DAMAGES.

1. In an action to recover damages for breach of a contract of sale, the plaintiff is entitled to such damages as may be fairly considered as arising in the usual course of affairs from the breach itself, or such as were contemplated by both parties at the time of making the contract, as the probable result of a breach. *Webster v. Woolford*, 329.
2. But where a contract has been made under special circumstances, and these were communicated by the plaintiff to the defendant, then the damages would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. *Ibid.*
3. Whether special damages may reasonably be supposed to have been in the contemplation of both parties, depends upon how much of the real situation of the parties was so disclosed at the time the contract was made as to render it a fair inference of fact that damages of that class were intended to be recovered if suffered. *Ibid.*
4. Where the action is in tort, founded on a breach of a contract of sale, the measure of damages is the same as in an action on the contract, when there is no question as to exemplary damages. *Ibid.*
5. The declaration set forth that defendant, professing to be a duly authorized agent of the owner, agreed to sell to the plaintiff certain property ; that plaintiff, after informing defendant of his purpose so to do, sold out his interest in a business in order to obtain money to pay for said property; that defen-

DAMAGES—*Continued.*

dant's representations in regard to his authority to sell were false and fraudulent, and made with intent to deceive, and the plaintiff claimed to recover damages resulting from such sale of his business, etc. Upon demurrer, *Held*, That upon these facts plaintiff was not entitled to recover the alleged special damages, since the same arise from a collateral, independent matter, in no way connected with the contract itself. *Ibid.*

6. Where a party who contracts to erect a building within a certain time fails to do so, and abandons work on the same, not wilfully, but without any valid excuse therefor, and the other party, after notice, proceeds to have the same completed, such party is entitled to recover from the contractor the value of the work and materials necessary to complete the building according to the contract, less any unpaid balance of the contract price. *Davis v. Ford*, 333.

See FALSE ARREST AND IMPRISONMENT, 6.

RAILROAD COMPANIES, 4.

DEAD BODIES.

SEE CORONER, 4.

DEBT.

A debt is money due upon a contract ; there must therefore be a creditor and a debtor as well as a sum due, and a contract out of which the indebtedness arises before there can be a debt. *Littig v. Hance*, 416.

DECEIT, ACTION OF.

See DAMAGES, 4, 5.

DEEDS.

1. In a deed executed prior to the Act of 1892, ch. 684, the lot was described as beginning at the southeast corner of Howard and German streets; running thence easterly on German street, &c., and the last line was described as running north-easterly, bounding on Howard street, to the place of beginning. *Held*, that the beginning point was placed on the east side of Howard street and not at the centre of the street, and that no portion of the bed of that street was conveyed by the deed. *Rieman v. Balto. Belt R. R. Co.* 68.
2. Where one end of a line is fixed on the side of a road or street, the line will be considered a straight line, and the other end will be considered as also fixed on the side of the road. *Ibid.*

DEEDS—*Continued.*

3. A deed will not be construed as being upon a condition subsequent, solely because it contains a clause declaring the purpose for which the land conveyed shall be used, when such purpose will not enure especially to the benefit of the grantor, and when there are no other words indicating an intent that the grant is to be void if the purpose is not carried out. *Kilpatrick v. Mayor, etc., of Baltimore*, 179.
4. If it be doubtful whether a clause in a deed is a covenant or a condition subsequent, the disposition of the Courts is to construe the language as creating a covenant or trust rather than a condition. *Ibid.*
5. An ordinance of the Mayor and City Council of Baltimore directed the Comptroller to acquire certain property for public use. This property was a triangular piece of land, vacant and with no streets passing through it. A deed was executed conveying to the city a part of said land in fee, the *habendum* clause containing the words, "as and for a street to be kept as a public highway." All of the land was used by the city for nearly twenty years as a public square and not as a street. If the part of the land conveyed by this deed were used as a street, the rest of the property would be incapable of improvement as a public square, as provided by the ordinance; and no ordinance ever authorized it to be purchased or accepted as and for a street. In an action of ejectment by the grantors in said deed to recover said land, *Held*, that the words in the *habendum* clause did not create a condition subsequent and work a forfeiture of the land to the grantors upon the failure of the grantee to use the same as a public street. *Ibid.*

See VENDOR AND PURCHASER, I.

DEVISE AND LEGACY.

1. Where the person to whom property is bequeathed under a will dies before the testator, such property passes to the next of kin of the legatee who are living at the death of the testator. *Garrison v. Hill*, 206.
2. Evidence of the declarations of a testator are inadmissible to establish his testamentary intention or to aid in the interpretation of his will. *Zimmerman v. Hafer*, 347.
3. If a will does not itself purport to make a particular devise, then no matter how plainly it may appear by some other paper that the testator designed that title should pass to certain property, it does not pass under the will, in the absence of apt words, or of a clear intent, that the title should pass by the will and not by the other paper. *Ibid.*
4. If an erroneous recital in a will be of a gift contained in the same instrument, the recital may operate as being in itself a

DEVISE AND LEGACY—*Continued.*

- devise or bequest by implication of that very property. But where the erroneous recital refers to an estate created by another instrument, such recital cannot operate to create an estate by implication. *Ibid.*
5. An explicit declaration in a will that the heir shall not inherit, is wholly ineffectual to defeat his right, unless there be a valid devise of the estate to some one else.. *Ibid.*
 6. A executed a voluntary deed conveying certain land to B, and on the same day he made a will in which, after reciting the execution of the deed, he gave and bequeathed to B all his personal property of every description, and declared that he thus gave all his estate to B, "because he is married to my niece, and I have been living with them for many years, and have a high regard and affection for them, and desire that they shall enjoy the same to the exclusion of my other relatives." A few days after the execution of the deed and will, the testator died, and upon a bill in equity against B by the heirs at law of A the deed was vacated, because it had been obtained by undue influence. B was in possession of the land and then filed a bill *quia timet* to have his title to the same established under the will, and to restrain the heirs at law of A from asserting title. *Held,*
 - 1st. That B had no title to the land under A's will, because the same does not purport to dispose of real estate or to devise the land in the event that the deed should not be operative.
 - 2nd. That the expression in the will of the testator's desire that B should enjoy the property cannot operate as a direct devise or as a devise by implication, because the whole clause pre-supposes that the land had been disposed of by the deed, and there was no intention to give the same by the will. *Ibid.*
 7. There is a distinction between a gift in a will of a debt as a debt, and the gift of the sum of money produced when the debt has been recovered. In the first case the legacy is specific and the collection of the debt in the testator's lifetime will adeem the legacy. In the other case the gift extends to and includes the fund in its altered state. *Littig v. Hance*, 416.
 8. A legacy will not be construed to be specific rather than general, unless the language of the will imperatively requires it. *Ibid.*
 9. When a fund is given subject to debts, or subject to other legacies, then a gift of the residue is not specific. *Ibid.*
 10. An erroneous addition to the description of the thing given by a will does not defeat the gift, when the thing is otherwise sufficiently identified, but in such cases the question is, conceding the mistake, is the intent clear upon the whole language employed. *Ibid.*

DEVISE AND LEGACY—*Continued.*

11. A testatrix bequeathed as follows after certain small legacies : “ And whereas the estate of my late husband, S., is indebted to me in a large sum of money for dividends, &c., to which I am entitled under the terms of his will, and also all moneys that may be due and owing to me from his estate and my late son F., after the payment of the money legacies hereinbefore mentioned, I give and devise the same absolutely to my sister-in-law, C.” Under the will of the deceased husband of the testatrix, she was entitled to a life-estate in one-third of his property and certain sums were due to her as interest thereon at the time of the execution of her will. She was also then entitled to a sum as her share of commissions as an executrix of his will. She was also entitled to a sum from the sale of a business which had been conducted by her deceased son, F. After the execution of her will these sums of money were all collected by her, or by her executor, deposited in bank to her credit, and a part thereof invested and a part otherwise disposed of. *Held,*
- 1st. That the legacy in the above cited clause was not a specific legacy of these debts as debts, and was consequently not deemed by their collection in the lifetime of the testatrix.
- 2nd. That although the sums of money bequeathed were mentioned in the will as debts, yet they were not such strictly speaking, and the intention of the testatrix was to give the money to be realized from the specified sources ; the words used being only descriptive of the then situation of the sums intended to be bequeathed.
- 3rd. That the will speaks from the death of the testatrix and not from its date, and carried whatever fund the testatrix possessed at her death, however invested, that answered the description in the will, and this description included all the moneys to which the testatrix was entitled from her husband's and her son's estates, whether collected by her in her lifetime or not. *Ibid.*

See WILLS.

DISTRAINT.

See LANDLORD AND TENANT.

DIVORCE.

See HUSBAND AND WIFE, 2.

DOMICIL.

See CORPORATIONS, 10.

EASEMENTS AND SERVITUDES.

1. A declaration set forth that the defendant was the owner of a narrow strip of land extending from his property to a public road, the same being used by him as a way; that plaintiff owned the land on both sides of said strip, and was entitled to have a gate maintained by the defendant at the public road where defendant's strip of land ended; but that the defendant removed the gate therefrom. *Held*, upon demurrer, that the declaration did not set forth a good cause of action, there being no allegation of any contract or deed by which defendant was bound either himself to maintain a gate at that point, or to allow the plaintiff to maintain one on defendant's land; and there being no allegation of a prescriptive right. *Rowe v. Nally*, 367.
2. The owner of a tract of land may convey a portion of it, and in the deed may retain an easement therein, for the benefit of the undisposed of part; or he may convey to his grantee an easement in the land which he retains. But these easements do not compel the owner of the land subject to them to perform work or service. It is the nature of a servitude not to constrain the owner of the servient tenement to do anything, but to restrain him from doing, or to compel him to suffer something to be done upon his property. *Ibid.*
3. A mortgagor cannot before default, by his own act and without the consent of the mortgagee, abandon an easement appurtenant to the estate and expressly included in the mortgage, so as to bind the mortgagee or prevent the easement from passing to the purchaser upon a foreclosure sale, although the security of the mortgage debt may not have been impaired by such abandonment. *Duval v. Becker*, 537.
4. The acts *in pais* relied on to constitute an abandonment of a right of way must be of a decisive character, and done by the party against whom they are invoked, or by one under whom he claims. *Ibid.*

EJECTMENT.

See LANDLORD AND TENANT, 6.

ELECTION.

See CONTRACTS, 4.

ELECTIONS AND VOTERS.

1. The jurisdiction of a Court to entertain appeals from the action of officers of registration of voters is special and limited and distinct from its general authority; and when a statute prescribes the time within which an appeal may be taken from the action of such an officer, neither an agreement of counsel nor an order of Court can confer jurisdiction to en-

ELECTIONS AND VOTERS—*Continued.*

tertain an appeal taken after the time fixed by statute. *Cox v. Bryan*, 287.

2. The Act of 1892, ch. 573, provides that a party aggrieved by the action of an officer of registration shall have the right to appeal forthwith from such action to the Circuit Court within one week after the final day of the October sitting of the registration officers. The appellant's name was struck from the list of voters in a certain precinct in the year 1894, when the day of such final sitting was October 15. On October 26, the State's Attorney agreed that no advantage should be taken of the fact that the petition or appeal was not filed within one week from the last day of the sitting. On October 27, the Court below ordered that the petition be filed as of October 22, and it was actually filed October 30. *Held*, that the Court had no jurisdiction to entertain the appeal, and that the same should be dismissed. *Ibid.*

ELECTRIC RAILWAYS.

See EMINENT DOMAIN, 3.

ELEVATED RAILWAYS.

See RAILROAD COMPANIES, 4-6.

EMINENT DOMAIN.

1. Property owned by a corporation is held subject to the power of eminent domain. *Turnpike Road v. Railroad Co.* 247.
2. Where the law is constitutional, under which condemnation is sought, a Court of Equity has no power to arrest the proceedings by injunction, since a special tribunal is empowered to determine all the questions arising under the inquisition. *Ibid.*
3. A railway company was authorized by an Act of the Legislature to construct and operate an electric railway upon the road of a turnpike company; to alter the grade of the road and change the location of tracks which the railway company was already operating as a horse railway under a contract with the turnpike company ; and the railway company was empowered to acquire the necessary easement and estate by condemnation. The turnpike company filed a bill to enjoin the prosecution of condemnation proceedings, after damages had been assessed by a jury, upon the ground that that the statute was in violation of the Constitution of the United States. *Held*, that the Legislature had the power to determine when the grant to the turnpike company must yield to the grant made to another corporation for a public purpose, and that the railway company had the right to con-

EMINENT DOMAIN—*Continued.*

- demn the property of the turnpike company, including that embraced in its contract with the horse railway company, for the purpose of constructing the electric railway. *Ibid.*
4. When there is a leasehold interest in land taken under the power of eminent domain, the lessee is entitled to just compensation for the value of his interest, precisely as the landlord is entitled to compensation for the value of his interest; and the sum of these values must be the full value of the property taken. *Gluck v. Mayor, etc., of Baltimore*, 315.
 5. For the purpose of widening a street, a part of a lot and building was taken under condemnation proceedings; the front wall was torn down, and the removal of the elevator in the building was made necessary. Under the lease, which had upwards of ten years to run; the tenant was bound by a covenant to pay rent, and the landlord was under no obligation to make repairs. In the condemnation proceedings, damages for all injuries to the building had been awarded to the landlord. Upon appeal by the tenant from the award to him, *Held*,
- 1st. That since the tenant was bound to pay rent, although the premises were made uninhabitable, and was himself obliged to make the repairs if he continued to occupy, he was entitled to be paid the amount necessary for making such repairs.
- 2nd. That the fact that the full value of the property taken had been paid to the landlord was no answer to the claim of the tenant to compensation. *Ibid.*

See RAILROAD COMPANIES, 4-6.

EQUITY.

1. After certain persons have been made parties, plaintiff and defendant in an equity suit, by order of the Court, upon a petition of the plaintiff alleging that they were necessary parties, and subsequent proceedings have been had in the cause, the solicitor of the plaintiff has no authority to file an order with the Clerk directing the dismissal of the bill as to said plaintiffs or defendants, without having previously obtained the sanction of the Court. *Riley v. First Nat. Bank*, 14.
2. And when the bill has been so dismissed, without an order of Court, as to said parties, who were fully advised as to the character of the controversy, they are nevertheless bound by the decree finally passed in the cause. *Ibid.*
3. After A. had executed an assignment for the benefit of creditors, the appellants, creditors of A., sued out attachments on original process. Subsequently a bill in equity was filed to declare the assignment void for fraud, and for the appointment of a receiver. Upon an order of the Court the ap-

EQUITY—*Continued.*

pellants were made parties to the cause. A. was afterwards adjudicated an insolvent, and his trustee in insolvency was also made a party, and claimed the entire assets. After the demurrers to the bill were overruled and some of the defendants had answered, the appellants and other creditors who had sued out attachments against A. were dismissed from the suit by order of the solicitor of the plaintiff, who continued the suit in the name of other creditors. The Equity Court finally decreed that the assignment was not fraudulent in fact or in law, but that the title of the trustees under it yielded to the superior title of the trustee in insolvency, to whom the assets of A. were transferred. In the Insolvent Court an account was stated distributing the assets among all the creditors of A. *pro rata*. Appellants excepted on the ground that the assignment was void and their attachments entitled them to priority, the trustee in insolvency taking the assets subject to the inchoate lien of the attachments.

Held,

- 1st. That since the appellants were dismissed from the equity suit without authority, they are bound by the final decree therein.
- 2nd. That the present claim of the appellants could have been set up in the equity suit, and therefore they are now estopped from making the same in the Insolvent Court; and the Equity Court having determined that the assignment was not fraudulent, the appellants are not now entitled to claim that, by reason of the assignment being void, their attachments gave them priority in the distribution of the assets.
Ibid.
4. When the jurisdiction of a Court of Law is concurrent with that of a Court of Equity, the Court which first exercises jurisdiction is, as a general rule, entitled to retain exclusive control of the issues. *Home Life Ins. Co. v. Selig*, 200.
5. A person who takes possession of the land of infants, managing the same for their benefit, is not entitled to an allowance for money expended by him in the purchase of an outstanding claim against the estate, not shown to be necessary, without the consent of the beneficiaries, then of age. *Shaw v. Devecmor*, 215.
6. Certain land sold at a tax sale was conveyed to the widow and infant children of the purchaser, who died after the sale. An uncle of the children took possession of the land for the grantees, receiving the rents and profits, and a claim to the land having been set up by the former owner, the uncle bought the title of such owner, and had the same conveyed to himself. Upon his books, the children were credited with the rents, etc., and charged with the sum paid for the

EQUITY—*Continued.*

said title. The children were of age at the time of this purchase, but their consent to the same was not obtained. After the death of the uncle a bill was filed against his executors and devisees, asking among other things for an account of the rents, etc. *Held*, that no charge should be made against said children for the sum so expended in the extinguishment of the outstanding title. *Ibid.*

7. A purchaser at a trustee's sale, who knew of an alleged defect in the title of the property at the time he made his bid, is not entitled to except to the ratification of the sale on that ground. *Stewart v. Devries*, 525.
8. A cross-bill may set up additional facts not alleged in the original bill, when they constitute part of the same defence and relate to the same subject-matter; and though the allegations of the cross-bill must relate to the matter of the original bill, it is not restricted to the issues under it. *Hooper v. Central Trust Co.* 559.
9. Where one creditor has a right to resort to two funds for the satisfaction of his debt, and another creditor can resort to but one of them, then, as between creditors, the former will be compelled to exhaust first that fund upon which the single creditor has no claim. This right to enforce a marshalling of the assets is not affected by a conveyance made by the debtor after the liens have attached. *Dize v. Beacham*, 603.
10. The owner of two vessels executed mortgages on both to secure payment of the same debt, the mortgages being recorded at the home port. Subsequently mechanics' liens for repairs were filed against the second vessel. The mortgagee sold both vessels under a power in the mortgages, and brought the proceeds into Court for distribution. After the lien claims were filed, the owner executed to plaintiff a bill of sale of one-half of the first vessel, and plaintiff also alleged that under a parol, unrecorded agreement, made before the execution of the mortgages, he was one-half owner of the first vessel, and had been in possession as such, and he claimed that the mortgage debt should be paid out of the proceeds of the sale of the second vessel before resorting to the first. The lienors, who had no claim on the first vessel, asked that the mortgage debt be first paid out of the proceeds of that vessel. *Held*,
 - 1st. That since the mortgages covered both vessels while the lien claims affected only the second, the mortgagee was bound, as against the lienors, to exhaust the proceeds of the sale of the first vessel before resorting to the proceeds of the sale of the second.
 - 2nd. That the mere possession of the first vessel by the plaintiff was apparently that of master and not inconsistent with

EQUITY—*Continued.*

ownership in another, and was not notice to the lienors that he was one-half owner under a parol contract: that inasmuch as the bill of sale to plaintiff was executed after the liens were filed, he could not ask to have the funds marshalled in any way to their prejudice, and that consequently he was not entitled to any part of the proceeds of sale, the same being insufficient to satisfy both the mortgage debt and the lien claims. *Ibid.*

See **EXECUTORS AND ADMINISTRATORS, 1, 2.**

INJUNCTIONS.**ESTOPPEL.**

See **EQUITY, 2, 3.**

HUSBAND AND WIFE, 2.

WILLS, 2.

EVICTION.

See **LANDLORD AND TENANT, 2.**

EVIDENCE.

1. Where one of the questions involved in the issue is whether a corporation was insolvent or not, evidence of a notary public that he had protested for non-payment commercial paper due by it is admissible. *Mish v. Main*, 36.
2. Declarations of a party, made just before he boarded the defendant's train, and the occurrence of the accident by which he was killed, touching his purpose in going on the train, are admissible as part of the *res gestae*. *B. & O. R. R. Co. v. State, use of Chambers*, 371.
3. When in an action of malicious prosecution, in order to show the end of the prosecution, the foreman of the grand jury has testified that the case against the plaintiff was dismissed, it is not competent to ask him on cross-examination why it was dismissed, for the purpose of showing that the prosecution was abandoned at the instance of the defendant. Different reasons may have influenced different grand jurors, and in most cases they should not be permitted to assign reasons for their actions. *Owens v. Owens*, 518.

See **CONTRACTS, 6.**

CORONER, 4.

DEVISE AND LEGACY, 2.

FRAUDULENT CONVEYANCES, 2.

HUSBAND AND WIFE, 1, 2.

MALICIOUS PROSECUTION, 2.

NEGLIGENCE, 4.

WILLS, 4, 5.

EXCEPTIONS.

See APPEAL, 5, 6.

EQUITY, 7.

PRACTICE IN EQUITY, 1.

EXECUTORS AND ADMINISTRATORS.

1. Where an executor refuses to pay over the money in his hands to a person claiming the same as distributee until the right of such person to receive it is established, equity has jurisdiction to grant relief upon a bill by the distributee against the executor. *Garrison v. Hill*, 206.
2. When a Court of Equity superintends the settlement of the personal estate of a decedent, the accounts of the executor, already settled in the Orphans' Court, should not be disturbed, unless they are clearly shown to be erroneous. Clear evidence of guilty knowledge, fraud or collusion should be produced to justify the Court of Equity in holding an executor responsible for a claim against the estate paid by him after it has been passed by the Orphans' Court. *Ibid.*
3. If an executor unnecessarily delays the settlement and distribution of the estate, keeps the funds thereof in his individual account in bank, and uses the same for his own purposes, he should be required to pay interest on the same. *Ibid.*

See APPEAL, 4.

LIMITATIONS, 4.

VENDOR AND PURCHASER, 2.

EXPERTS.

See WILLS, 4, 5.

FALSE ARREST AND IMPRISONMENT.

1. Plaintiff, while a passenger on defendant's train, was intoxicated and guilty of a flagrant and continuous breach of the peace. Upon the arrival of the train at a station, the conductor caused plaintiff to be arrested without a warrant, by a police officer, being the first officer whom the conductor saw, and taken before a magistrate, by whom a fine was imposed. In an action for false imprisonment against the railroad company, *Held*, that under these circumstances the arrest was lawful. *Ballo. & Ohio R. R. Co. v. Cain*, 87.
2. The right to make the arrest depended upon whether the plaintiff was in fact guilty of a breach of the peace, and not upon whether he was so charged by the conductor. *Ibid.*
3. If the plaintiff had in fact not been guilty of a breach of the peace, the defendant would be liable for the act of the conductor in ordering his arrest at the railway station for such

FALSE ARREST AND IMPRISONMENT—*Continued.*

- alleged cause, because the plaintiff while there was still a passenger and entitled to protection against the illegal acts of defendant's employees. *Ibid.*
4. If a felony or breach of the peace has in fact been committed by the person arrested, the arrest may be justified by any person without warrant. And in the above case, the act of the conductor in telegraphing for a policeman and, within a short space of time thereafter, handing plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor in the midst of the riot and disorder, and the prompt delivery of him afterwards to an officer. *Ibid.*
 5. A person, other than an officer, may take into custody, without warrant, one who in his presence is guilty of an affray or or a breach of the peace. And such person may also arrest the affrayer after the actual violence is over, but whilst he shows a disposition to renew it. *Ibid.*
 6. In an action to recover damages for false imprisonment, a prayer instructing the jury that if they find for the plaintiff, "they are at liberty to take into consideration all the circumstances attending the alleged arrest, the indignity to the plaintiff, his mental and bodily sufferings incident to the act, and award such damages as they may believe will compensate plaintiff for the wrongful act of the defendant," states correctly the measure of damages. *Ibid.*

FORFEITURE.

See **DEEDS**, 5.

LANDLORD AND TENANT, 6.

RAILROAD COMPANIES, 3.

SALES, 1.

FRAUD.

See **CORPORATIONS**, 2-5.

INJUNCTIONS, 1.

FRAUDULENT CONVEYANCES.

1. The directors of a corporation, which was engaged in the manufacture of bicycles, made a sale of all the property of the corporation to the president thereof, who gave to each director his personal notes, payable in bicycles, for the shares of stock held by the directors respectively, at the rate of twenty per cent. of the par value. Under this arrangement the defendant, one of the former directors, received from the president a number of bicycles which were made from material on hand at the time of said transfer. The defendant

FRAUDULENT CONVEYANCES—*Continued.*

knew that the corporation was hopelessly insolvent at the time of the sale of the assets to the president and the execution by him of his notes so payable in bicycles, in consideration of the defendant's shares of stock. Plaintiff was subsequently appointed receiver of the corporation, and brought an action of replevin to obtain said bicycles from the defendant. *Held*, that this transaction, if the above facts were found by the jury, was a mere contrivance to deprive the creditors of the corporation of their rights ; that it was the duty of the receiver to avoid and nullify the same, and that the action of replevin was an appropriate remedy. *Mish v. Main*, 36.

2. In the above-mentioned action evidence is admissible to show judgments against the corporation and mortgages executed by it, and that the directors knew that the company was insolvent ; also to show the value of the property sold to the president, and the inadequacy of the consideration received for that replevied in this case, and that similar transactions had taken place between the president and a director other than the defendant. *Ibid.*

GUARANTY.

1. A guaranty is a mercantile instrument to be liberally construed, according to the intention of the parties, as manifested by the terms of the guaranty taken in connection with the subject-matter, and in order to ascertain the intention of the parties, the circumstances of the whole transaction may be considered. *Hooper v. Hooper*, 156.
2. The Statute of Limitations begins to run in favor of a guarantor from the time he is liable to suit, and this may or may not be the same time the principal debtor becomes so liable. *Ibid.*
3. When a guarantor agrees to pay a certain debt of the principal upon thirty days notice, his liability is not enforceable until after the expiration of the designated time, and the Statute of Limitations does not begin to run before that time. *Ibid.*
4. The liability of a guarantor is coextensive with that of the principal, unless it be expressly limited. And, so, where the principal debtor makes a part payment before the Statute of Limitations has attached, this fixes a new date from which the statute begins to run as to a guarantor or surety. *Ibid.*
5. Where one of several guarantors pays the debt before it has been barred by limitations, he is entitled to demand contribution from the other guarantors, and the Statute of Limitations does not begin to run against such demand until the date of such payment *Ibid.*

GUARANTY—*Continued.*

6. Mere delay by the creditor in demanding payment from the principal debtor will not discharge a guarantor, unless the delay has been unreasonable and loss and injury have resulted therefrom to the guarantor. If, during the whole time, the principal debtor was unable to pay, the delay has not injured the guarantor. *Ibid.*
7. A was indebted to the W. Co. to the extent of \$41,224. The W. Co. was indebted to B in the sum of \$23,000, and to C in the sum of \$60,000, and these sums stood to their credit on the books of the company. B and C were officers of the company, and also guarantors, together with D, of A's debt to the company. They caused entries to be made on the books of the W. Co., by which B's account and C's account were each debited with \$20,612, and the total of these two debits was credited upon A's account. The money was in bank, subject to the control of the W. Co. *Held*, that the result of this transaction was to extinguish A's debt, and was such a payment to the W. Co. of the amount due under the guaranty as entitled B and C to demand contribution from their co-guarantor, D. *Ibid.*
8. Where the guaranty is of an sum not exceeding \$35,000, for goods sold and money loaned to a certain party, and there is no provision made for an immediate payment, the guaranty embraces also interest upon the capital sum mentioned. *Ibid.*
9. In April, 1889, A, B and C executed a guaranty by which they jointly and severally agreed to pay to the W. Co., on thirty days notice, any sum that might then or thereafter be due to the W. Co., not exceeding \$35,000, for goods sold and money loaned to D, each of said guarantors reserving the right to withdraw from the agreement by written notice to the others and to the company, such notice, however, not to cancel his obligation as to indebtedness existing when given. Under this guaranty, loans were made to D by the W. Co., beginning in October, 1888, and extending to June, 1889. In 1890 and in 1891 D paid the interest on the indebtedness, and on February 7, 1894, gave a note for part of the principal and interest, which was credited on the account as a payment. Up to July, 1891, C was the treasurer of the W. Co., and, in accordance with custom, charged up interest on the account every four months. On April 15, 1891, C notified the other guarantors and the W. Co. that he declined to be responsible under the guaranty for any indebtedness which should be incurred after that date. On March 26, 1894, the W. Co. demanded payment of the indebtedness from D and from the guarantors. D was unable to pay, and A and B notified C that they would pay the same, and requested him to contribute his proportion. On April

GUARANTY—*Continued.*

2, 1894, A and B paid to the W. Co. the sum of \$41,224, being the amount of D's indebtedness, including interest, calculated as above mentioned, and on the next day filed a bill for contribution against their co-guarantor, C. This bill was dismissed because it was held that the defendant's liability under the guaranty did not begin until after thirty days notice, and the notice from the W. Co. had been given less than thirty days before the suit was instituted. On May 29, 1894, the present bill was filed, asking for a decree compelling the defendant C to contribute and pay to A and B his proportion of the debt covered by the guaranty, and so paid by the plaintiffs. The guarantors and the principal debtor were brothers, and the object of the guaranty was to said D, who was less prosperous than the others. The defendant relied chiefly upon the Statute of Limitations.

Held.

- 1st. That the intention of the parties was not that the guarantors should only be liable for three years (the period of the Statute of Limitations) from the date of the guaranty, or for three years from the date of the last item in the account due to the W. Co., but that they should continue liable so long as the liability of the principal debtor continued a subsisting, undischarged indebtedness, and that their conditional liability to pay became a fixed obligation, as against them, not at the time the principal debtor was liable to suit, but upon the expiration of the thirty days notice from the W. Co.
- 2nd. That by the terms of the guaranty, the guarantors could not be required to pay, and could not be sued for a failure to pay until after the expiration of a thirty days' notice from the W. Co., and therefore the Statute of Limitation did not begin to run in their favor before that time, however it might have affected the principal debtor.
- 3rd. That where a claim is enforceable against the principal debtor, it is also enforceable against the guarantors, their liability being co-extensive with his, and since payments on account of the indebtedness were made by D, the principal debtor, before the expiration of three years from the time it accrued, his liability to the W. Co. was not barred by limitations at the time the plaintiffs paid the same, and it was consequently not barred as against the guarantors.
- 4th. That under the circumstances of this case, the Statute of Limitations did not begin to run against the claim of the plaintiffs for contribution from their co-guarantor until the date of the payment by them to the creditor.
- 5th. That since there was no evidence that the principal debtor D was at any time able to discharge the indebtedness, or that he was less able to do so in March, 1894, when de-

GUARANTY—*Continued.*

mand was made than previously, the defendant was not injured by the delay in demanding payment, and was not entitled to rely upon the defence of *laches*. *Ibid.*

See PRINCIPAL AND SURETY.

HABITUAL DRUNKARD.

See CONSTITUTIONAL LAW, 4, 5.

HIGHWAYS AND STREETS.

See RAILROAD COMPANIES, 3–6.

HOSPITAL.

See CORONER, 4.

HUSBAND AND WIFE.

1. A child born in lawful wedlock, when non-access of the husband is not established, is presumed to be legitimate, and neither the evidence of the mother nor of an adulterer is admissible to prove that the child is not the offspring of the husband. *Scanlon v. Walshe*, 118.
2. In a bill for a divorce from her husband, S., the plaintiff, alleged that certain children were the issue of the marriage, and the decree awarded their custody to her. Subsequently, in a petition for a change of name, the plaintiff averred that after being divorced she had married W., and asked that the names of the children “born to her and her said husband,” S., might be changed to W., which was accordingly ordered. Some years afterwards, upon the death of W. intestate, plaintiff claimed that these children were not the offspring of her former husband, S., but of W.; that after her marriage with W., he acknowledged them to be his children, and that consequently, under Code, Art. 46, sec. 29, such marriage and acknowledgement made them the legitimate children of W. At the time the children were born, it was not shown conclusively that S. had no access to plaintiff. *Held*,
- 1st. That the evidence of the plaintiff and the declarations of W. were not competent to show that the children were not the legitimate children of S., and also that the evidence generally was not strong enough to overcome the presumption expressed in the maxim, *pater est quem nuptiae demonstrant*.
- 2nd. That the marriage of the plaintiff and W., and the latter's acknowledgment of the children, were not, under these circumstances, evidence of their illegitimacy.
- 3rd. That in cases under the above statute, the fact of illegitimacy must be first proved, and then marriage and acknowledgement may be offered to show paternity.

HUSBAND AND WIFE—*Continued.*

- 4th. That the plaintiff was estopped, by her allegations in the bill for a divorce and in the petition for a change of the names of the children, from contradicting her statements then made, that these were the children of S., and the estoppel also applies to W., since he was the instigator of both proceedings and in a position to know the facts. *Ibid.*
3. A contract by a married woman to convey her real estate, executed jointly with her husband, is valid under Code, Art. 45, sec. 2, and specific performance of such contract will be decreed. *Klecka v. Ziegler*, 482.
4. A married woman may become surety on a note executed by her jointly with her husband, and in such case it is not necessary, in order to hold her liable, that the consideration of the contract should enure to her benefit. *Fredericktown Savings Instu. v. Michael*, 487.
5. The heirs to whom an estate descended agreed in writing that, in order to avoid a partition suit, the property should be sold by a certain auctioneer. One of the heirs, a married woman, became the purchaser through an agent appointed orally by her and her husband. The auctioneer made a memorandum of the sale at the time. *Held*, that the purchase was binding on the married woman. *Moore v. Taylor*, 644.
6. Under the law as it stood at the time of the death of a married woman seized of property, her husband was entitled to act as her administrator without taking out letters. *Held*, that a *bona fide* purchaser of land from her heirs, twenty years after her death, would take a title free from the claims of any creditors of the married woman who might subsequently appear. *Ibid.*

See **NEGLIGENCE**, 3.

ILLEGITIMACY.

See **HUSBAND AND WIFE**, 2.

INDICTMENT.

See **CRIMINAL LAW**, 1, 2.

INFORMATION.

See **CRIMINAL LAW**, 1, 2.

INJUNCTIONS.

1. An injunction will not be granted to restrain the prosecution of an action at law on policies of life insurance by an assignee thereof, upon the ground that the policies and the

INJUNCTIONS—*Continued.*

assignment and assent thereto of the insurer had been procured by fraud, since that question can be determined in the action at law. *Home Life Ins. Co. v. Selig*, 200.

2. After an action at law on a policy of life insurance had been instituted by an assignee thereof, and pleas were filed alleging fraud in procuring the policy and in the assignment, the defendant filed a bill in equity alleging that the policy and the assignment, etc., had been obtained by fraud, and asking that the plaintiff in the action be restrained from further prosecuting the same, and for a cancellation of the policy if fraudulent, and if not, then for a determination of the question of the ownership of the proceeds. *Held*, that the bill should be dismissed because these questions could be tried in the action at law, and also because if a Court of Equity had concurrent jurisdiction in the premises, yet the Court of Law, having first assumed control of the subject-matter, was entitled to retain it. *Ibid.*

See EMINENT DOMAIN, 2.

INQUEST.

See CORONERS, 4.

INSOLVENCY.

1. When a debtor applies for the benefit of the insolvent law his property passes in *custodia legis* for the benefit of all his creditors, and cannot be taken by his landlord under a restraint warrant. *Fox v. Merfeld*, 80.
2. A conveyance of real estate made by a person who is adjudicated an insolvent within four months thereafter, is not void as a preference under the insolvent law, when the consideration thereof was paid prior to the date of the deed, and the same was executed in pursuance of a valid contract to make the conveyance. *Nicholson v. Schmucker*, 459.
3. Defendants, who were co-owners with N. of certain real estate, agreed to buy his interest therein for \$7,000. Certain negotiable bonds belonging to defendants were in the possession of N. for safe-keeping, and it was agreed that he should take seven of these bonds in payment for the property. The deed from N. was not executed until more than a month after the agreement. At the time the agreement was made N. had, without the knowledge of the defendants, hypothecated one of their bonds and sold another, but defendants believed N. to be solvent, and there was no intent to acquire a preference. Within four months after the execution of said deed, N. was adjudicated an insolvent, and his trustee in insolvency filed a bill to vacate the conveyance, as con-

INSOLVENCY—*Continued.*

taining an unlawful preference. *Held*, that the deed did not create such preference, but was a *bona fide* conveyance for a consideration paid at the time, and as such is valid under the Act of 1890, ch. 364. *Ibid.*

4. Where a mortgage is vacated as a fraudulent preference under the insolvent law, yet a note secured by it, of which note the insolvent's wife was a joint maker, remains valid. *Fredricktown Savings Instu. v. Michael*, 487.

See CORPORATIONS, 3, 4.

EQUITY, 3.

EVIDENCE, I.

FRAUDULENT CONVEYANCES, I, 2.

INSTALMENT SALES.

See AGENCY, I.

SALES, I.

INSURANCE, LIFE

See BENEFIT SOCIETIES, I, 3.

INJUNCTIONS, I.

INTEREST.

Where the parties to a transaction amongst themselves treat accrued interest as an augmentation of the original principal sum, and charge up interest thereon, one of the parties cannot afterwards object to such method of computation as a compounding of interest. *Hooper v. Hooper*, 156.

See AGENCY, I.

EXECUTORS AND ADMINISTRATORS, 3.

INTERROGATORIES TO JURY.

See PRACTICE, I.

JUDGMENTS.

See APPEAL, 3.

PRACTICE, 2.

LANDLORD AND TENANT.

1. When, at the time a distressment is issued by a landlord, the tenant had applied for the benefit of the insolvent law, his property cannot be taken under the distress for rent due at the time of the application. *Fox v. Merfeld*, 80.

LANDLORD AND TENANT—*Continued.*

2. A taking of part of demised land by condemnation is not an eviction, and the tenant remains liable, under his covenant, to pay the rent originally reserved, because nothing short of a surrender, a release or an eviction will discharge him from his covenant in this behalf. *Gluck v. Mayor, etc., of Baltimore*, 315.
3. Where part only of property subject to a lease is condemned, the condemnation proceedings do not operate to abate any portion of the rent, and since the tenant remains liable to pay the whole rent, he is entitled to compensation for this element of injury. *Ibid.*
4. A landlord is under no obligation to make repairs upon the demised premises, unless he has covenanted so to do. *Ibid.*
5. The lessee of certain property, mistaking the lines of his lot as described in the lease, made his improvements partly on land not within his boundaries, but belonging to the lessor. The lessee mortgaged the leasehold interest, describing the same as in the lease. Subsequently the lessee surrendered the lease to the lessor and received a new lease, describing correctly the lot actually occupied by him. The mortgage was foreclosed and the lot conveyed to the purchaser by the description in the *first* lease and the mortgage. The rent or reversion, as described in the *second* lease, was conveyed to the plaintiff. The assignees of the leasehold paid rent to the reversioner, and all parties recognized their respective ownership of the lot actually occupied. *Held*,
 - 1st. That the surrender of the old lease and the acceptance of the new one by the mortgagor—lessee, although not *per se* binding as against the mortgagee, was beneficial to all parties subsequently interested, and had been ratified and confirmed by their subsequent acts.
 - 2nd. That the title of the reversioner to the lot actually occupied by the assignee of the lease was good, and specific performance would be decreed of a contract to buy the rent. *Judik v. Crane*, 610.
6. A lease provided that if the rent reserved should at any time during the tenancy be for more than ninety days due and in arrear, “then the said tenancy shall be at once, and without notice of any kind, determined, and the party of the first part become and be entitled to immediate possession of the premises aforesaid, provided he shall so elect, but not otherwise.” *Held*, that upon such default in the payment of the rent, the landlord was entitled to maintain an action of ejectment for the premises without having previously made a demand of payment. *Shanfelter v. Horner*, 621.
7. In such action the tenant cannot be asked why he did not pay the rent when due. *Ibid.*

LAPSED LEGACY.

See **DEVISE AND LEGACY**, 1.

LEASE.

See **LANDLORD AND TENANT**.

LEGITIMATION OF CHILDREN.

See **HUSBAND AND WIFE**, 2.

LIBEL.

1. Falsely to publish of one that he "would be an anarchist if he thought it would pay," is libellous *per se*. *Lewis v. Daily News Co.* 466.
2. Every publication injurious to one's reputation is in law false and malicious until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive. *Ibid.*
3. Upon a demurrer to the declaration in an action for libel, it is for the Court to determine whether the words charged amount in law to a libel, and whether the innuendo is fairly warranted by the language declared on. *Ibid.*
4. An innuendo cannot enlarge, or add to the sense of the words declared on or properly impute to them a meaning which the publication either in itself or taken in connection with the inducement and colloquium does not warrant or fairly imply. *Ibid.*

LICENSE.

See **RAILROAD COMPANIES**, 3.

LICENSE TAXES.

See **CONSTITUTIONAL LAW**, 8-10.

OYSTERS, 1.**LIENS.**

See **CORPORATIONS**, 9, 10.

VENDOR AND PURCHASER, 1.**LIMITATIONS.**

1. A non-resident defendant who voluntarily appears in an attachment suit cannot rely upon the Statute of Limitations, although the plaintiff is also a non-resident, unless the defendant has been within this State for the statutory period after the cause of action accrued. *Mason v. Union Mills Co.* 446.

LIMITATIONS—*Continued.*

2. A resident of another State has the same right to maintain an action in the Courts of this State that is possessed by a resident of this State, and if the suit be against a non-resident debtor, the defendant has no greater right to plead limitations against him than he has when the plaintiff is a resident of this State. *Ibid.*
3. Where both plaintiff and defendant are non-residents and the cause of action sued on is a contract made and to be performed in another State, the plaintiff is entitled to the benefit of Code, Art. 57, sec. 5, which provides that if a defendant is absent from the State when the cause of action accrues, he shall not be entitled to rely upon limitations if the plaintiff shall commence the action within the statutory period after defendant's presence in this State. *Ibid.*
4. In an action against an administrator on a contract made by his intestate, a plea that "the alleged cause of action did not accrue within three years of the decedent's death," is a sufficient compliance with the language of the statute. *Wallace v. Schaub*, 594.

See CONSTITUTIONAL LAW, 1-3.

GUARANTY, 2-5.

WILLS, 8.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, it was held upon the facts that the evidence was sufficient to authorize the jury to find that the defendant caused the plaintiff's arrest, that the same was without probable cause and malicious, and that the prosecution was at an end. *Owens v. Owens*, 518.
2. In an action for malicious prosecution, evidence that after the arrest and imprisonment of the plaintiff, efforts were made by the defendant to have the prosecution dismissed is not admissible, either in bar of the suit or in mitigation of damages. *Ibid.*

MANDAMUS.

1. *Mandamus* is an appropriate remedy to enforce payment of a sum of money ordered by decree to be paid by a municipal corporation. *M. & C. C. of Baltimore v. The Keely Institute*, 106.
2. The remedy by *mandamus* is not one which is accorded *ex debito justitiae*. The writ is a prerogative one, and unless the right, which the relator seeks to enforce, is clear and unequivocal, a *mandamus* will not be granted. *State ex relatione v. Latrobe*, 222.

MANDAMUS—Continued.

3. An ordinance of Baltimore City provided that no person should, under any pretext, dig up any of the streets of the city without having first obtained a written permit therefor from the City Commissioner, approved by the Mayor. *Held*, that if a person or corporation is duly empowered by ordinance or legislative enactment to do an act involving such digging up of streets, as, for instance, to lay a street railway, neither the Mayor nor the City Commissioner can prevent the performance of that act by refusing to issue the permit, and in such cases its issue, not involving the exercise of a discretion, can be enforced by *mandamus*. *Ibid.*
4. But if a person or corporation has not the right to do the thing which it is proposed to do under the permit applied for, the Mayor would be under no obligation to issue it, not because he has a discretionary power to grant or withhold it, but because, either with or without the permit, the proposed act would be illegal. *Ibid.*

MARRIAGE AND DIVORCE.

See **HUSBAND AND WIFE**, 2.

MARSHALLING OF ASSETS.

See **EQUITY**, 9, 10.

MAXIMS.

Falsa demonstratio non nocet, 431.

Haeres legitimus est quem nuptiae demonstrant, 130.

Pater est quem nuptiae demonstrant, 130.

Qui prior est tempore potior est jure, 606.

MECHANICS' LIEN.

1. Where the contract for materials to be used in the construction of houses was made with the lessee of the land, the estate of the lessor is not subject to a mechanics' lien therefor. *Hoffman v. McColgan*, 390.
2. Defendant, the owner of a number of lots of unimproved ground, leased the same to C. for 99 years, reserving a rent of six dollars per front foot. On the same day, the defendant and C. made a contract by which C. agreed to erect houses on the lots and the defendant agreed to pay to C. the sum of \$500 on each house as a bonus, and also to lend to C., or procure to be loaned, the sum of \$700 on each house. C. then procured bricks for the structure on credit from the plaintiff, telling him that payment would be made with money to be advanced by the defendant. Before completion of the houses C. became insolvent, and abandoned the work.

MECHANICS' LIEN—*Continued.*

Plaintiff filed a mechanics' lien for the materials supplied by him, and a bill in equity to enforce the same against the reversionary interest of the defendant. *Held*, that under Code, Art. 63, sec. 9, the reversionary estate of the defendant was not subject to the mechanics' lien. *Ibid.*

See EQUITY, 10.

MISTAKE.

See DEVISE AND LEGACY, 4, 10.

LANDLORD AND TENANT, 5.

MORTGAGES.

1. The doctrine that the mortgagor, while in possession and before foreclosure, is treated as the real owner of the property, does not apply between mortgagor and mortgagee ; and the mortgagor cannot by his own act release the easements appurtenant to the mortgaged estate, or force the mortgagee to accept as security for the payment of the debt anything less than the entire estate originally granted. *Duval v. Becker*, 537.
2. Where leasehold property is mortgaged, a surrender of the lease and the acceptance of a new lease in its place by the mortgagor alone, has no effect as against the mortgagee and those claiming under him at a mortgage sale. *Judik v. Crane*, 610.
3. But such new lease may become valid by the ratification and acknowledgement thereof by the purc' after the mortgage sale, and the reversioner. *Ibid.*

See CORPORATIONS, 11.

EQUITY, 10.

MUNICIPAL CORPORATIONS.

1. When a municipal corporation has the power to abate a nuisance, it is liable to persons injured in consequence of its failure to exercise such power. *Cochrane v. &c., Mayor of Frostburg*, 54.
2. The Mayor and City Council of Frostburg is authorized by its charter to pass and enforce ordinances to remove nuisances from its streets, as well as regulations necessary for the peace, good order and safety of the city. In an action against the municipality, the declaration alleged that the defendant permitted large numbers of horses and cattle to run at large upon the streets, and had failed to pass any ordinances to remove such nuisance and source of danger ; and that while plaintiff was walking in a street of said city, she was attacked and trampled upon by a cow so running at large and greatly injured. Upon a demurrer to the declaration, *Held*,

MUNICIPAL CORPORATIONS—*Continued.*

- 1st. That under its charter the defendant had the power to prevent cattle from running at large within the corporate limits, and that it was its duty so to do if the allegations of the declaration were true.
- 2nd. That if the animal by which the plaintiff was injured was on the street without any fault on the part of the owner, then the defendant is not liable; for a municipal corporation should not be held to a higher degree of liability for injuries done by domestic animals than the owners thereof.
- 3rd. That the defendant would not be liable unless it could have prevented this animal from running at large by the exercise of ordinary care.
- 4th. That if the animal causing the injury to the plaintiff was on the street for so short a time that it could not have been discovered by the defendant's officers by the exercise of reasonable diligence before it attacked the plaintiff, then the defendant would not be liable, unless the cow's running at large can be attributed to the failure of the defendant to pass and enforce ordinances to prevent cattle from running at large. *Ibid.*
- 3. The municipal corporation of Baltimore City is empowered by the Legislature to establish the lines within which wharves may be built or improvements made into navigable waters within the city limits. *Classen v. Howard*, 258.
- 4. Where a party is authorized by a municipal ordinance to build out certain piers to the Pier Head Line, and such right has not been exercised before the passage of a subsequent ordinance establishing different lines within which piers may be built, the latter ordinance is a revocation of the privilege granted by the former. *Ibid.*

See CONSTITUTIONAL LAW, 1, 2, 4, 5.

MANDAMUS, 3, 4.

RAILROAD COMPANIES, 3.

NEGLIGENCE.

- 1. In an action to recover damages for an injury alleged to have been caused by the defendant's negligence, the case should not be withdrawn from the jury on the ground of the plaintiff's contributory negligence, when the evidence shows that the plaintiff was walking alongside of his wagon, on a city car track, when defendant's cart, drawn by a mule, but with no driver in sight, approached on the opposite track, and that the mule, when four or five feet distant, turned suddenly out of the track towards the plaintiff, crushing him between the wheel of the cart and his own wagon, and that plaintiff made every effort to get away when the mule turned

NEGLIGENCE—*Continued.*

- out of the track, but was unable to do so. *Grabrues v. Klein*, 83.
2. Intoxication on the part of the injured person is not proof of negligence *per se*. *B. & O. R. R. Co. v. State, use of Chambers*, 371.
 3. The fact that a man killed by the negligence of the defendant had been separated from his family for twelve years preceding his death and had contributed nothing to the support of the plaintiffs, does not prevent a recovery by them; the marital relation and the rights and duties growing thereout continued to exist. *Ibid.*
 4. There were two stations of the defendant company in the town of B., known as the West and East station. The deceased, after declaring to friends his intention to go to Washington, boarded, at midday, a local train of the defendant, by jumping on the platform of a car next to the tender of the engine, at the West station and was carried half a mile to the East station, whence a train started for Washington. Upon arriving there he went on a platform across the tracks towards the ticket office, and while so attempting to cross, a passenger train passing through the station at a rate of speed variously estimated as from 17 to 35 miles an hour, struck and killed the deceased. Other passengers were crossing the track at the same time, and the deceased did not look out for approaching trains before attempting to cross. There was conflict of evidence as to whether a bell was rung and whistle blown by the train that struck the deceased. There was testimony showing that the deceased was somewhat under the influence of liquor at the time he boarded the train at the West station. In an action by the widow and infant child to recover damages, *Held*,
 - 1st. That it was immaterial how the deceased got from the West station to the East station, if when at the latter station he was rightfully on defendant's premises and traversed the way usually taken by passengers to the ticket office.
 - 2nd. That there was evidence from which the jury could find that when he crossed the tracks he was in quest of a ticket to Washington, and under the circumstances of the case he was not bound to stop, look and listen before crossing.
 - 3rd. That an instruction to the jury that if the deceased was slightly intoxicated when he got aboard the first train, but was not drunk at the time of the accident, then the jury cannot infer that he was guilty of want of ordinary care is correct.
 - 4th. That it was negligence on the part of the defendant to run a train through the station at a high rate of speed while another train was standing there discharging passengers, under the circumstances of this case.

NEGLIGENCE—*Continued.*

- 5th. That a rule of the defendant company to the effect that "when one passenger train is standing at a station receiving or discharging passengers on double track, no other train will attempt to run past until the passenger train at the station has moved on, or signal given by the conductor of the standing train," is admissible in evidence.
- 6th. That the time tables of the defendant company were also admissible in evidence.
- 7th. That testimony as to whether the deceased saved anything out of his earnings is not admissible. *Ibid.*
5. If the carrier, being unable from causes beyond his control, to provide a passenger coach, according to its contract, substitutes a baggage car, and in the course of the journey, by reason of some fault in the vehicle, the passenger is injured, the carrier is liable therefor, unless it can show that it exercised the utmost care and diligence, and that the baggage car was a safe conveyance. *Balto. & Potomac R. R. Co. v. Swann*, 400.
6. In such case it cannot be imputed to the passenger as negligence, or as an assumption of the risk, that he took passage in the baggage car, when no other means of conveyance were offered. *Ibid.*
7. Whether in this case the carrier made diligent effort to procure a passenger coach, and whether the baggage car was a safe vehicle, are proper questions to be submitted to the jury. *Ibid.*
8. And in this case a prayer based upon a comparison between the injuries complained of by the plaintiff as received in the baggage car and those that might have been suffered in a passenger coach, should be rejected, because altogether conjectural. *Ibid.*
9. The fact that a passenger is injured while travelling on a train of defendant is *prima facie* evidence of negligence, throwing upon the carrier the burden of showing that the injury could not have been prevented by the exercise of the utmost care and diligence on its part. *Ibid.*

NON-SUIT.

See COSTS, 3.

NUISANCE.

See MUNICIPAL CORPORATIONS, 1, 2.

RAILROAD COMPANIES, 4, 6.

OFFICE AND OFFICERS.

1. A State's Attorney has no authority to institute proceedings in the nature of a *quo warranto* in order to oust an incumbent from a public office. *Hawkins v. State*, 306.
2. State's Attorneys in Maryland possess no other powers than those prescribed by the Constitution or by statute. *Ibid.*

See CORONER, 1-4.

ORDINANCES.

See MANDAMUS, 3.

MUNICIPAL CORPORATIONS.

ORPHANS' COURT.

See WILLS, 1, 2.

OYSTERS.

1. Under the Act of 1894, ch. 380, the Clerks of the Circuit Courts of the counties are required to pay to the Comptroller of the Treasury one-third of the amount received for permits to take oysters under scraping licenses, and not one-half of said amount. *Smith v. County School Comrs.* 513.
2. The Act of 1894, ch. 380, sec. 29, provides that *one-third* of the money received from the county oyster scraping licenses shall be paid into the Treasury of the State and placed to the credit of the "Oyster Fund." Section 30 of said Act provides that all licenses not used shall be returned by the Clerks of the Courts to the Comptroller, and the said Clerks shall also pay to the Comptroller *one-half* of all moneys received for *such* licenses, which sum shall be paid to the credit of the "Oyster Fund." *Held*, that the language of section 30 is too vague to repeal by implication the express provision of section 29, and that upon the whole Act the intention of the Legislature appeared to be that *one-third* of the county scraping licenses should be paid into the State Treasury. *Ibid.*

See CONSTITUTIONAL LAW, 8, 9, 10.

PARENT AND CHILD.

See HUSBAND AND WIFE, 2.

PARTIES TO ACTIONS.

1. Where the estate of a landlord in certain premises and lease thereof was conveyed to the plaintiff in trust for the city of Baltimore. *Held*, that the plaintiff was authorized to maintain ejectment for non-payment of rent. *Shanfelter v. Horner*, 621.

PARTNERSHIP.

1. Upon the formation of a partnership between A, B and C, it was agreed between A and B (who contributed the capital) that A should receive a salary of \$450 per month, but upon the books of the firm A and C were each credited with \$300 per month and B with \$150 per month; and A received for some time the amount credited to B. The other partner, C, was ignorant of this agreement between A and B. Upon a bill for an account, filed by A after the dissolution of the firm, *Held*, that, as against the firm assets, A was entitled only to the sum of \$300 per month, while as to the additional sum of \$150 per month, his recourse was only against B. *Keiley v. Turner*, 269.
2. In the above case the partnership was dissolved in December, 1882, but there were no entries of salaries on the books of the firm after August 1, 1881, at which time the bookkeeper was directed to discontinue the same as to all the partners. There was then an agreement between A and B, unknown to C, that A's salary was to continue as previously. *Held*, that in this case A was not entitled to claim any salary after August 1, 1881. *Ibid.*
3. It was stipulated in the articles that salaries should be paid out of the funds of the partnership, and should not be considered as losses. A allowed a portion of his said salary as partner to remain in the firm and be used for its benefit. *Held*, that he was entitled to interest on each month's salary as it became due, in the same manner that interest was allowed semi-annually to B on his contribution to the capital of the firm. *Ibid.*
4. Upon the dissolution of a firm composed of A, B and C, the stock of merchandise on hand was taken possession of by B, who charged himself with it at a valuation fixed by himself and C. Some of the merchandise was shipped by B to New Orleans, and a loss was sustained on the shipment, owing to the failure of the purchasers to pay for it. Upon a bill by A for an account of the partnership affairs, *Held*,
 - 1st. That A was entitled to his share of the true value of the property at the time it was appropriated by B, such appropriation having been made with his consent, and that he had no concern with the subsequent appreciation or depreciation in the value of the property.
 - 2nd. That the merchandise shipped to New Orleans, having been insured at a certain rate, and it being shown that it was customary in insuring such cargoes to add ten per cent. to the invoice cost, it could be assumed in this case that the value of the cargo was the amount insured, less ten per cent., and this amount should be charged to B as a fair price for the property at the time he took it into his possession. *Ibid.*

PASSENGERS.

See **CARRIERS**, 1.
NEGLIGENCE, 4-6.

PAYMENT.

See **VENDOR AND PURCHASER**, 1.

PERJURY.

See **CRIMINAL LAW**, 3.

PLEADING.

See **EASEMENTS AND SERVITUDES**, 1.
LIBEL, 2.

PLEADING IN EQUITY.

See **EQUITY**, 8.

POOL SELLING.

See **CRIMINAL LAW**, 1.

POSSESSION.

See **EQUITY**, 10.

POST-MORTEM EXAMINATION.

See **CORONERS**, 1-4.

PRACTICE.

1. Where the Court is asked, before the arguments begin, to submit to the jury special interrogatories under the Act of 1894, ch. 185, and the interrogatories submit material questions of fact, the request should be granted. *Balto. & Ohio R. R. Co. v. Cain*, 87.
2. Where, after a verdict for the plaintiff, the defendant moves for a new trial, there can be no final judgment on the verdict until the motion for a new trial is overruled or otherwise disposed of. *Heiskell v. Rollins*, 397.

See **COSTS**.

PRACTICE IN COURT OF APPEALS.

See **APPEAL**.

PRACTICE IN EQUITY.

In filing exceptions to testimony in equity cases, it is not necessary to set forth all the reasons and grounds on which the exceptions are based. *Scanlon v. Walshe*, 118.

See **EQUITY**.

PRINCIPAL AND AGENT.

See AGENCY, 1-3.

PRINCIPAL AND SURETY.

1. The plaintiff bank was the holder of promissory notes for money loaned to W. upon which the defendant was liable as surety. In response to plaintiff's demand for the renewal, with additional security, of the notes, some of which, including the one sued on in this case, were overdue, W. gave to the plaintiff bank the joint note of himself and wife for the principal sum of his entire indebtedness, and executed a mortgage to the bank of his real estate to secure the payment thereof, in which his wife united; and thereupon the former notes were delivered by the plaintiff to W. The bank knew at the time that W. had failed to pay his debts at maturity. Within four months after this transaction W. applied for the benefit of the insolvent law, and upon a bill filed by his trustee in insolvency, the mortgage from W. and wife to the plaintiff was vacated and annulled, as being a preference under the insolvent law, and it was decreed that the original promissory notes should be returned to the plaintiff bank. This action was instituted on one of them against W. and the defendant, and the latter pleaded payment and satisfaction. *Held,*
- 1st. That since the plaintiff had voluntarily accepted the note and mortgage of W. and his wife in lieu of the note sued on, and with knowledge of W's. precarious financial condition, the liability of the defendant as surety was extinguished.
- 2nd. That although the mortgage was vacated as a fraudulent preference under the insolvent law, yet the note secured by it remained valid, and the liability of W's. wife as joint maker thereof was unaffected. *Fredericktown Savings Instu. v. Michael*, 487.
2. A creditor does not lose his right to enforce the liability of a surety by mere delay to proceed against the principal debtor or to enforce a sale of property held as security for the debt. *Gray v. Farmers' Bank*, 631.
3. Plaintiff was a surety on a note given to the defendant bank by A. The note was secured by a deed of trust of the property of A., the principal debtor, and was renewed from time to time, the plaintiff signing the renewal notes until 1885, when he informed A. that he would no longer sign a renewal. The bank was notified of plaintiff's refusal, and, after the maturity of the last note signed by plaintiff, a renewal note was presented to the bank without plaintiff's name. This was declined and returned to A., and plaintiff informed thereof. Subsequently the bank agreed to renew the note without plaintiff, provided other security was obtained in

PRINCIPAL AND SURETY—*Continued.*

his place, with the assent of the co-sureties, and interest and discount paid ; but no renewal note was in fact accepted. A. expected to renew the note, and deposited with the bank to his individual credit funds to meet the discount and interest. In 1886 the cashier, the note being overdue for nearly a year, made an entry on the books by which these funds were placed to the credit side of the bank's account as interest on the note. An action was brought on the last note signed by plaintiff and judgment obtained against him. Afterwards he filed a bill to restrain execution, alleging that he was ignorant at the time of the action of the facts concerning the renewal of the note. *Held,*

- 1st. That the bank did not in fact agree to release plaintiff except upon conditions that had not been complied with, and that plaintiff remained liable upon the last note signed by him.
- 2nd. That the bank had a right to apply the funds of A. deposited with it to the payment of the note *pro tanto*, and that the entry on the books by the cashier did not import the making of a contract for the renewal of the note without the plaintiff's name.
- 3rd. That if the entry on the books of the bank were to be construed as payment of interest on the note in advance, and an agreement to extend the time so as to discharge the surety, then the cashier had no authority to make such contract or entry, and his action in the premises had not been ratified by the directors. *Ibid.*

See GUARANTY, 2-6.

PROMOTERS.

See CORPORATIONS, 6, 7.

QUO WARRANTO.

See OFFICE AND OFFICER, I.

RAILROAD COMPANIES.

1. A statute providing that a certain railway company shall furnish reasonable facilities and all cars for receiving and forwarding coals offered for transportation, does not impose upon the company the obligation to permit other corporations having coal for transportation, to make connection by means of a switch with its road. *Frostburg Mining Co. v. C. & P. R. R. Co.* 28.
2. The charter of a railway company, granted in 1849, gave to any corporation, which might be *thereafter* incorporated, the right to make connection with the railway. The appell-

RAILROAD COMPANIES—*Continued.*

lant corporation was chartered by an Act of Assembly before the railway company was created, and its charter expired in 1878, when an Act was passed continuing the Act of incorporation in force for thirty years. In 1876 a statute was passed amending the charter of the railway company, and providing that it should furnish reasonable facilities for the transportation of all coal offered. *Held,*

- 1st. That the Act of 1878 did not create a new corporation, and therefore the appellant was not entitled to make a switch connection with the tracks of the railway company, the appellant having been incorporated before the railway company.
- 2nd. That the Act of 1876 did not repeal by implication that provison in the charter of the railway company, by which its obligation to allow connections to be made by other corporations was limited to those thereafter created. *Ibid.*
3. An ordinance of Baltimore City, passed in April, 1892, authorized a certain railway company to lay tracks, &c., upon designated streets, and directed that the company should commence the work of constructing the tracks within six months from date, and should complete the road within twelve months thereafter, otherwise the rights granted to be null and void. A proviso declared that this limit of time should not apply in case of delay caused by other parties, or in case any of the designated streets may not have been graded and paved at the time of the approval of the ordinance, or in case any of such streets should be undergoing repairs so as to interfere with laying the tracks, but that that then the time for the *completion* of the road shall be extended for a period of twelve months from the completion of such grading or repairs, or the removal of such delay. An ordinance of the city, of November 25, 1892, provided that no person or corporation should dig or tear up any of the streets of the city without having first obtained a written permit approved by the Mayor. When the railway company's ordinance was passed, some parts of some of the designated streets were not graded and paved, and a bridge on one of the streets was not completed until October, 1893. The railway company caused thirty feet of track to be laid on one street on October 7, 1892, and nothing more was done towards constructing the road until June 7, 1894, when application was made to the Mayor and City Commissioner for a permit to dig up the streets, for the purpose of laying the tracks of the company. Upon their refusal of the application, a petition was filed praying for a *mandamus* directing the issue of such permit by the Mayor and Commissioner. *Held,*

RAILROAD COMPANIES—*Continued.*

- 1st. That under the ordinance the company was bound to begin the work of laying the tracks within six months from its enactment, and that the extension of time in the proviso to twelve months after the completion of the grading of the streets related, not to the beginning of the work by the company, but to its completion after its progress had been interrupted.
- 2nd. That because some of the designated streets were not graded and paved at the time of the passage of the ordinance, the company was not relieved from the necessity of beginning the work within six months thereafter, but the time-limit was only suspended in case the specified obstacles arrested the actual construction.
- 3rd. That the laying down of only thirty feet of track in October, 1892, was not such a beginning of the work as was contemplated by the ordinance.
- 4th. That since the company had failed to comply with the conditions of the ordinance its rights under the same were lost and it was not entitled to the *mandamus* asked for.
- 5th. That after the lapse of the time limit, the enactment of the ordinance requiring permits to dig up the streets was in effect a denial of the company's authority to exercise the rights granted to it, upon conditions which had not been complied with.
- 6th. That under these circumstances the failure of the company to begin and complete the road within the time specified by the ordinance could be availed of by the Mayor as a defence to the application for a writ of *mandamus*. *State ex rel. time, &c. v. Latrobe*, 222.
4. When the construction of an elevated railway in a city street diminishes the rental value of property leased to the plaintiff, he is entitled to recover damages therefor to the extent to which the usable value of his premises has been thereby diminished, although the premises are not directly opposite the elevated structure. *Lake Roland Co. v. Webster*, 529.
5. The fact that a corporation is authorized to build and operate an elevated railway does not exempt it from liability for injuries to property lying upon or near to the street occupied. *Ibid.*
6. An elevated railway, duly authorized to be constructed, upon a street of a city, is not a nuisance, and no one can maintain an action for the damage caused by such obstruction to travel which he suffers in common with the public at large. *Ibid.*

See CARRIERS.

EMINENT DOMAIN, 3.

FALSE ARREST AND IMPRISONMENT, 1-6.

NEGLIGENCE.

RATIFICATION.

See **CORPORATIONS**, 5.

LANDLORD AND TENANT, 5.

RECEIVERS.

See **CORPORATIONS**, 10.

FRAUDULENT CONVEYANCES, 1, 2.

RECEIVERS' CERTIFICATES.

See **CORPORATIONS**, 8, 9.

REGISTRATION OF VOTERS.

See **ELECTIONS AND VOTERS**.

RENT.

See **LANDLORD AND TENANT**.

REPLEVIN.

See **FRAUDULENT CONVEYANCES**, 1, 2.

RES GESTAE.

See **EVIDENCE**, 2.

RIPARIAN OWNERS.

See **WATER AND WATER COURSES**. 1.

SALES.

1. Where a contract for the sale of goods on the instalment plan provides that upon default of the buyer in paying any instalment the contract might, at the option of the seller, be annulled, and the latter entitled to retake the goods, and the seller, after a default, promises to extend the time of payment of such instalment, such promise is a waiver of his right to declare a forfeiture for that default, and he is not authorized to retake the goods until the expiration of the time so limited. *Cole v. Hines*, 476.

See **DAMAGES**, 1, 2.

EQUITY, 7.

SECURITY FOR COSTS.

See **COSTS**, 2.

SHIPS AND SHIPPING.

1. A transfer of an interest in a vessel, not registered under sec. 4192 of the Revised Statutes of the U. S., does not convey a title except as against the grantor and persons with actual notice of the same; it is not available against subsequent lien claimants who had no notice thereof. *Dize v. Beacham*, 603.

SOLICITOR IN CHANCERY.

See **EQUITY**, 1-3.

SPECIFIC LEGACY.

See **DEVISE AND LEGACY**, 7, 8, 9.

SPECIFIC PERFORMANCE.

See **HUSBAND AND WIFE**, 3.

LANDLORD AND TENANT, 5.

STATE'S ATTORNEY.

See **OFFICE AND OFFICER**, 1.

STATUTE.

See **ACTS OF ASSEMBLY**.

CODE PUBLIC GENERAL AND LOCAL LAWS.

CONSTITUTIONAL LAW, 6, 11, 14.

STATUTORY CONSTRUCTION, 1, 2.

STATUTE OF FRAUDS.

1. Full performance of a contract takes it out of the operation of the Statute of Frauds. *Nicholson v. Schmucker*, 459.
2. When the memorandum of a contract under the fourth section of the Statute of Frauds is signed by an agent, it is not necessary that he should have been appointed in writing. *Moore v. Taylor*, 644.
3. When land is sold at public auction, the auctioneer is the agent of both buyer and seller to sign the memorandum required by the statute; and the same is complete when he makes an entry of the purchaser's name and the terms of the sale. *Ibid.*

See **GUARANTY**.

STATUTES, BRITISH

21 James I, chap. 16. Relating to limitations, 449, 450, 452.

29 Car. II, c. 3. See **STATUTE OF FRAUDS**.

4 & 5 Anne, chap. 16. Relating to limitations, 449, 450, 452.

17 & 18 Vict., c. 38. Requiring railway companies to furnish reasonable facilities, 33.

STATUTES OF UNITED STATES.

Sec. 4192, Rev. Stat. Relating to registration of transfers of vessels, 609.

STATUTORY CONSTRUCTION.

1. The repeal of a statute by implication is never favored in law, and it is only when two Acts are repugnant and plainly inconsistent with one another that the latter Act operates as a repeal by implication of the former. *Frostburg Mining Co. v. C. & P. R. R. Co.* 28.
2. The rule that if two statutes are plainly repugnant to each other, the later Act operates to the extent of the repugnancy as a repeal of the first, applies also to different sections of the same law. *Smith v. County School Comrs.* 513.

STOCKHOLDERS.

See CORPORATIONS, 2-5, 6, 7, 10, 11.

STREETS.

See RAILROAD COMPANIES, 3-6.

SURRENDER OF LEASE.

See LANDLORD AND TENANT, 5.

TAXATION.

See CONSTITUTIONAL LAW, 8, 10.

OYSTERS, 1, 2.

TRUSTEES' SALE.

See EQUITY, 7.

TURNPIKE COMPANIES.

See EMINENT DOMAIN, 3.

UNDUE INFLUENCE.

See WILLS, 7.

VENDOR AND PURCHASER.

A vendor's lien is not waived by a recital in the deed that the consideration has been paid; and it prevails against the grantee and his privies in estate and against those claiming as volunteers, or even as purchasers for value, if they have notice that the purchase money remains unpaid. *Hooper v. Central Trust Co.* 559.

W. conveyed his interest in certain land to his brothers in trust to pay the income to himself for life, and upon his death, in

VENDOR AND PURCHASER—*Continued.*

default of testamentary appointment, to distribute “the principal sum thereof” to his brothers and sisters. Upon his death no letters of administration were taken out. *Held*, that a *bona fide* purchaser of the land from said grantees seven years after the date of the deed, would have a complete defence to the claims of possible creditors of W. *Moore v. Taylor*, 644.

VESSEL.

See SHIPS AND SHIPPING, I.

VESTED RIGHTS.

• See CONSTITUTIONAL LAW, 12.

VOTERS.

See ELECTIONS AND VOTERS.

WARRANTY.

See BENEFIT SOCIETIES, I.

WATER AND WATER COURSES.

1. Plaintiff and defendant were owners of adjoining lots of ground fronting on navigable water, in the city of Baltimore, at a point where the shore is concave. In 1880 the defendant was authorized by ordinance to erect a solid wharf in front of his lot the full width thereof, to the Bulkhead Line, and also two piers from the Bulkhead Line to the Pierhead Line. Defendant erected the wharf, but did not build said piers. In 1881 another ordinance was passed, which was accompanied by a map, establishing the lines within which permits for pier or bulkhead extensions should be granted to the owners of lots on this shore. According to the lines thus established, a part of defendant's solid wharf was within the lines allotted to the plaintiff on the Bulkhead Line, and the piers authorized by the ordinance of 1880, if constructed, would be almost wholly within the Pierhead Lines of plaintiff's lot. Plaintiff claimed that defendant was a trespasser so far as the wharf was concerned, and that defendant should be enjoined from erecting said piers. *Held*,
- 1st. That defendant was entitled to maintain his wharf to the Bulkhead Line, since the privilege to erect it became a vested right by having been acted upon before the passage of the second ordinance.
- 2nd. That the plaintiff was entitled to an injunction to restrain the erection of piers by the defendant beyond the Bulkhead Line, since the privilege to do so, given by the ordi-

WATER AND WATER COURSES—*Continued.*

nance of 1880, was subject to revocation before being acted upon, and the ordinance of 1881 was a revocation thereof.

- 3rd. That the defendant now has a right to build piers to the Pierhead Line, taking so much of that line as is allotted by the map of 1881 to the plaintiff, as is in proportion to the defendant's acquired right on the Bulkhead Line; and that plaintiff's right to the Pierhead Line is to be measured by his frontage on the Bulkhead Line according to the map, diminished by so much thereof as is occupied by defendant's wharf. *Classen v. Howard*, 258.

WAYS.

See EASEMENTS AND SERVITUDES, I.

WHARVES AND PIERS.

See MUNICIPAL CORPORATIONS, 3, 4.

WATER AND WATER COURSES, I.

WILLS.

1. The Orphans' Court cannot send issues to be tried at law to determine whether a part only of a will was obtained by fraud or undue influence, when such part is not distinct and severable, and cannot be taken from the will without subverting its general scheme and purpose. *Fisher v. Boyce*, 46.
2. After a will had been admitted to probate, a bill in equity was filed by the executors against all parties interested for the construction of the same and the administration of the estate. The petitioners in this case were parties to the suit, and answered admitting the due execution, &c., of the will and codicil, and subsequently asked for an allowance from the income. Two years afterwards the petitioners alleged in the Orphans' Court that that part of the residuary clause, by which the testator directed that the sums charged against his children on his books should be treated as parts of their shares, and the codicil republishing the will, had been obtained by fraud and undue influence practised upon the testator, and asked that issues might be sent to a Court of Law to determine this question. Held, that the petitioners, under these circumstances, were estopped to deny the validity of the will, there being no allegation that since the probate thereof they had acquired knowledge of facts previously unknown to them respecting the issue. *Ibid.*
3. An attending physician is competent to testify as to the mental capacity of a testator, without first stating the facts and circumstances upon which his opinion is based. *Crockett v. Davis*, 134.

WILLS—*Continued.*

4. The opinion of a medical expert on that subject is not only some evidence, but is generally very important evidence to go to the jury, particularly if he was well acquainted with the testator and attended him professionally. *Ibid.*
5. But if a medical expert gives the reasons upon which his opinion is founded, and they are such as men of ordinary knowledge can weigh, and are, in the judgment of the Court, clear absurdities from which no rational inference can be deduced, then his opinion that the testator did not have mental capacity is not legally sufficient evidence to prove the same. *Ibid.*
6. When the question was as to testamentary capacity *vel non*, a physician who was the son-in-law of the testatrix, and who had attended her professionally for a number of years, including the time when the will was made, testified that in his opinion she was not then of sound and disposing mind, capable of executing a valid deed or contract; that a caveat to her late husband's will, filed shortly before she executed her own, had greatly excited her; that she was in bad health, forgetful, self-contradictory and could easily be persuaded to do absurd things; that she suffered from chronic gastritis, which had weakened her mind, and that he could not remember all she said which produced that impression on him. Other witnesses testified that the testatrix was melancholy, weak, nervous and excitable. *Held*, that the reasons given by the physician for his opinion were not so inconclusive as to justify the Court in withdrawing the question of testamentary capacity from the consideration of the jury. *Ibid.*
7. Upon the trial of a caveat to a will, where one of the issues involved the question of undue influence, the evidence showed that the testatrix, who had children by two husbands, bequeathed the greater part of her property to her children by her second husband; that most of the property had been acquired by her own industry; that her relations with the children so excluded were of an affectionate character; that she lived eighteen months after making the will and never spoke of it to the caveators. There was no evidence that any of the legatees under the will knew that it had been made. *Held*, that these facts did not constitute any legally sufficient evidence of undue influence. *Ibid.*
8. The Act of 1894, ch. 405, provides that no will shall be subject to caveat, or other objection to its validity, after the expiration of three years from its probate. Previous to this Act there was no limitation as to the time within which a caveat could be filed. *Held*, that since the Legislature could not rightfully give to this law a retroactive effect, it would be construed as prospective in its operation, and that under it proceedings

WILLS—*Continued.*

against wills probated before the Act was passed must be commenced within three years from the date of the passage of the Act, and proceeding against wills thereafter probated must be commenced within three years from the date of the probate. *Garrison v. Hill*, 551.

9. A retroactive effect could not be given to this Act, because if a will probated more than three years before its passage was really invalid, the heirs at law of the testator had a vested right in his property, and as the law then stood had a right to recover it. This vested right could not be taken away by a statute which took away at once all remedy. *Ibid.*

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